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No. OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

McCREARY COUNTY, KENTUCKY, et. al.,
Petitioners.

v.

ACLU OF KENTUCKY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Mathew D. Staver
(Counsel of Record)
Anita L. Staver
Horatio G. Mihet
Liberty Counsel
1055 Maitland Center
Commons, 2d Floor
Maitland, FL 32751
(800) 671-1776
court@lc.org

Stephen M. Crampton
Mary E. McAlister
David M. Corry
Liberty Counsel
PO Box 11108
Lynchburg, VA 24506
(434) 592-7000
court@lc.org
Attorneys for
Petitioners

QUESTIONS PRESENTED

1. Whether (a) passage of nearly ten years, (b) a change in governmental decision-makers, (c) official renunciation of prior actions and (d) a display and resolutions setting forth legitimate secular purposes are constitutionally significant facts sufficient to erase a so-called taint of religious purpose found in prior displays on a courthouse wall containing the Ten Commandments so as to permit the display of eleven equally sized framed historical documents, one of which is the Ten Commandments, and if not, then what would constitute constitutionally significant facts sufficient to purge a prior taint and permit the display.

2. Whether the Establishment Clause is violated by a privately donated display on government property that includes eleven equally sized frames containing an explanation of the display along with nine historical documents and symbols that played a role in the development of American law and government where only one of the framed documents is the Ten Commandments and the remaining documents and symbols are secular.

3. Whether the *Lemon* test should be overruled since the test is unworkable and has

fostered excessive confusion in Establishment Clause jurisprudence.

4. Whether a new test for Establishment Clause purposes should be set forth by this Court when the government displays or recognizes historical and otherwise passive expressions or displays of religion.

PARTIES

Petitioners are McCreary County, Kentucky, and its County Judge Executive, Blaine Phillips, and Pulaski County, Kentucky, and its County Judge Executive, Barty Bullock (collectively, "the Counties").

Respondents are the American Civil Liberties Union of Kentucky, Louanne Walker and Dave Howe as residents of McCreary County, and Lawrence Durham and Paul Lee as citizens of Pulaski County (collectively, "Respondents").

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OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals (App., 1a-33a) is reported at 607 F.3d 439. The opinion of the Court of Appeals denying rehearing and rehearing en banc is not reported, but is reprinted at App., 34a-35a. The opinion of the District Court granting the Motion to Amend or Alter Judgment and granting a permanent injunction is unreported, but is reprinted at App.,36a-53a. The opinion of the District Court denying summary judgment is reprinted at App., 54a-72a.

JURISDICTION

The judgment of the Court of Appeals was filed on June 9, 2010. The Court of Appeals denied rehearing en banc on July 29, 2010. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case raises issues involving the Establishment Clause of the First Amendment to the United States Constitution, as applied to the states under Section 1 of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The Sixth Circuit has added another strand to the tangled web of Establishment Clause analysis. The panel acknowledged but then immediately disregarded this Court's statement that the religious purpose found in the Counties' prior displays containing the Ten Commandments would not forever "taint" future displays. *ACLU v. McCreary County*, 607 F.3d 439, 449 (6th Cir. 2010) (citing *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 873-874 (2005)). The Sixth Circuit held that *McCreary County* established that the contents, not just the "tainted" history of the Counties' initial Foundations of American Law and Government Displays ("Foundations Displays"), violated the Establishment Clause. *Id.* Acknowledging that its decision created an intra-circuit conflict with other Sixth Circuit panels which found identical Foundations Displays constitutional,[1] the *McCreary County* Sixth Circuit panel chided its colleagues for allegedly not following this Court's "definitive conclusion" that the contents of the Foundations Display are unconstitutional. *Id.* at 449.

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[1] *ACLU of Ky. v. Grayson County*, 591 F.3d 837 (6th Cir. 2010); *ACLU of Ky v. Mercer County*, 432 F.3d 624 (6th Cir. 2005).

In fact, it is the *McCreary County* Sixth Circuit panel, not the panels in *Mercer County* and *Grayson County*, which has contravened this Court's direction that its 2005 decision in *McCreary County* should be read narrowly so as to not categorically preclude the integration of the Ten Commandments into a governmental display on law or American history. *McCreary County*, 545 U.S. at 873-874. The conflict between the Sixth Circuit's ruling in this case, this Court's 2005 *McCreary County* ruling, and the rulings by the same Sixth Circuit in *Mercer County* and *Grayson County* is indicative of the ongoing, pervasive confusion in Establishment Clause analysis of passive religious displays. Five years ago, shortly after this Court's decision in *McCreary County*, the *Mercer County* panel called Establishment Clause jurisprudence "purgatory." *Mercer County*, 432 F.3d at 636.[2] The Sixth Circuit's decision here

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[2] The Sixth Circuit's comment is illustrative of the criticisms leveled against this Court's Establishment Clause jurisprudence in general and the *Lemon* test in particular and points to the need to review and replace *Lemon*. *See e.g., Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring) (Establishment Clause cases are "in hopeless disarray"); *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (noting

demonstrates that the problem has only gotten worse since this Court's 2005 decisions in *McCreary County* and *Van Orden v. Perry*, 545 U.S. 677 (2005).

Without stating why Petitioners' measures were insufficient or what measures would be sufficient, both the District Court and Sixth Circuit merely concluded that the actions taken by the Counties since 2005 were not enough to "purge the taint" of religious purpose from a decade ago. (App., 21a-22a). The first of those displays were stand-alone framed copies of the Decalogue placed on walls in the courthouses in McCreary and Pulaski counties in 1999. (App., 2a). About one month after Respondents initially filed suit in 1999, Petitioners enacted resolutions authorizing expanded displays that included eight other documents in smaller frames with a copy of the Ten Commandments. (App., 3a). After the District Court issued a preliminary injunction

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the "sisyphean task of trying to patch together the 'blurred, indistinct, and variable barrier' described in *Lemon*"); Adam M. Conrad, *Note, Hanging The Ten Commandments On The Wall Separating Church And State: Toward A New Establishment Clause Jurisprudence*, 38 GA. L. REV. 1329, 1356 (2004) ("In thirty years the [*Lemon*] test has earned nothing but ridicule from both academia and the bench.").

against the first and second displays, the counties installed the Foundations Display. (App., 5a). The Display includes eleven equally sized framed documents, including the Ten Commandments, Magna Carta (in two frames), Declaration of Independence, National Motto, Mayflower Compact, Preamble to the Kentucky Constitution, the Bill of Rights, lyrics to the national anthem, a picture of Lady Justice, and an explanatory document. (App., 5a). The District Court issued a supplemental preliminary injunction against the Foundations Display, finding that the "clear purpose" of the Display, in light of the prior two displays, was religious. (App., 6a). A divided Sixth Circuit upheld the decision. *ACLU of Ky. v. McCreary County*, 354 F.3d 438 (2003).

This Court, in a 5-4 decision, affirmed the preliminary injunction, remanded the case, and cautioned that its ruling should not be read as saying that Petitioners' past actions forever taint future actions. *McCreary County*, 545 U.S. at 873-874. In March 2005, after this Court heard oral argument but before its decision, Petitioners enacted resolutions that repealed and repudiated the December 1999 resolutions approving the second displays. (App., 8a). In a footnote, this Court acknowledged the resolutions, but said that they were of minimal significance in light of the

evolution of the evidence to that point. *Id.* at 872 n.19.

Cross-motions for summary judgment were filed after discovery, but the District Court denied both parties' motions for summary judgment, (App., 72a), stating:

> Since it is possible to purge the taint of the impermissible religious purpose, it necessarily follows that the injury from the constitutional violation is not "continuing" as required by the standard for a permanent injunction. Therefore, the court will deny the plaintiffs' motion for summary judgment, which seeks to permanently enjoin the third displays, because they are not entitled to a permanent injunction as a matter of law.

(App., 67a). The court found that the Counties had not "purged the taint" of the first two displays and therefore were not entitled to judgment as a matter of law, (App., 69a), but the court also found that the Plaintiffs were similarly not entitled to summary judgment. The Plaintiffs/Respondents filed a Motion to Alter or Amend the order, asking the Court to, *inter alia*, reverse itself and enter a permanent

injunction invalidating the Foundations Displays. (App., 42a).

The composition of the governing bodies of both Counties had significantly changed since 1999, and even since 2005, and both Counties passed new resolutions in 2007, again repudiating the first two displays and declaring a clear secular and educational purpose for the Foundations Displays. (App., 42a). The Counties submitted the new resolutions to the District Court as part of a renewed Motion for Summary Judgment and response to Respondents' Motion to Alter or Amend the Judgment. (App., 42a). The District Court granted the Respondents' motion (App., 51a), and issued a permanent injunction against the Foundations Displays (including the prior two displays even though the Counties had repudiated them years ago), declaring all of the displays unconstitutional. (App., 51a-52a)).

The Counties appealed pursuant to 28 U.S.C. §1292(a)(1) and the Sixth Circuit by a divided vote affirmed. *ACLU v. McCreary County*, 607 F.3d at 448-449. The same majority panel (which was the same majority that ruled in the 2003 Sixth Circuit *McCreary County* case) found that the passage of time, change in county personnel, and the adoption of new resolutions renouncing the prior acts were

not sufficient to purge the "religious taint" of the prior displays. *Id.* at 448.

> [T]he fact that more time has passed since the Supreme Court decision is meaningless in this case, because Defendants have spent the time since the Supreme Court decision continuously seeking to accomplish their initial purpose of posting the Ten Commandments as a religious document. Unlike a case in which the passage of time might have some significance, there has been no dormant period here; Defendants have continuously sought to defend their actions and accomplish what they initially set out to do. Third, the change in government personnel is irrelevant, because the "objective observer" test does not encompass "judicial psychoanalysis of a drafter's heart of hearts." *Id.* [*McCreary County*, 545 U.S.] at 862, 125 S.Ct. 2722. Finally, the two sets of "new" government resolutions are not new: the 2005 resolutions were enacted before the Supreme Court's decision and deemed of minimal significance by the Court, and the 2007 resolutions were passed more

> than a year after the close of discovery in response to the district court's finding that the posting of the Foundations Displays continued to violate the Establishment Clause.

Id. The panel held that the 2007 resolutions, "like the previous statements of purpose, were adopted only as a litigating position." *Id.* "Thus, like the 2005 resolutions, the 2007 resolutions provide little evidence that Defendant's actual purpose has changed and are of minimal significance in light of the evolution of the evidence." *Id.* (citing *McCreary County*, 545 U.S. at 872 n. 19).

The majority panel attempted to distinguish the conflicting rulings in *Mercer County* and *Grayson County* by asserting that this Court "has definitively found that the display at issue violates the Establishment Clause, and we are obligated to follow that precedent if no constitutionally significant facts have changed." *McCreary County*, 607 F.3d at at 449. In fact, this Court's 2005 decision in *McCreary County* only ruled on the purpose prong of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) at the preliminary injunction stage, and never addressed the effects prong of *Lemon*.

Judge Ryan dissented and wrote:

> The only real difference [between this case and the prior *McCreary County* case] is that this appeal presents the question whether the defendants have "purged" the "Foundations of Law and Government Displays" of the religious "taint" of the Ten Commandments. My colleagues think they have not. I think they could not because there was no "taint" to be "purged," and even if there were, the defendants' effort to do so has been disqualified as a mere "litigating position."...
>
> My colleagues have deftly foreclosed consideration of the issue whether the counties' 2007 resolutions expressly disclaiming any intention to endorse religion may have "purged the taint" of religion from the third set of displays with the dismissive observation that the 2007 resolutions were "adopted only as a litigating position." With that nearly Clausewitz-perfect blocking action, I am left with nothing to add to what I wrote in *McCreary III* [354 F.3d 438 (2003)], except the

following:

1. I humbly associate myself with Justice Scalia's powerful and logically compelling explanation in *McCreary IV* [545 U.S. 844 (2005)] that the displays in question do not violate the First Amendment and never did.

2. I cannot be too critical of my panel colleagues who feel stare decisis bound by the Supreme Court majority's persistent hostility to religion and its refusal to acknowledge the historical evidence that religion, religious symbols, and the support of religious devotion were of the very essence of the values the Constitution's authors and the ratifying legislators thought they were preserving in the language of the First Amendment.

The result, I fear, is that federal courts will continue to close the Public Square to the display of religious symbols as fundamental as the Ten Commandments, at least until the Supreme Court rediscovers the history and

> meaning of the words of the religion clauses of the First Amendment and jettisons the flawed reasoning of *Lemon*....

(App., 31-33a).

The Sixth Circuit's misinterpretation of this Court's prior ruling and the acknowledged intra-circuit conflict regarding identical displays is symptomatic of the much larger problem of unarticulated standards for and inconsistent rulings on Establishment Clause challenges to passive religious displays. The confusion resulting from the lack of a coherent Establishment Clause standard will only continue to grow until this Court steps in to provide the objective standards legislators need to avoid falling into Establishment Clause traps. This Petition provides this Court with the opportunity to finally tear down the walls of the labyrinth of Establishment Clause jurisprudence.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S FINDING THAT THE FOUNDATIONS DISPLAYS REMAIN "TAINTED" BY AN IMPERMISSIBLE RELIGIOUS PURPOSE FROM A DECADE AGO CONFLICTS WITH THIS COURT'S DECISION IN MCCREARY COUNTY AND PRECEDENTS REGARDING LEMON'S PURPOSE PRONG.

In *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005) this Court determined that the Counties' first two displays containing the Ten Commandments evinced an impermissible religious purpose, but that it was not a permanent "taint" to future displays. *Id.* at 873-874. This Court eschewed a "once tainted always tainted" approach and stated that integrated historical displays which include the Ten Commandments can withstand Establishment Clause challenges. *Id.* at 874. Contrary to that determination, the Sixth Circuit held that this Court definitively determined that the contents and history of the Foundations Display are impermissible so that the passage of time, change in government

leadership and explicit renunciation of prior governmental actions cannot erase the "taint" from a decade ago. *ACLU v. McCreary County*, 607 F.3d 439, 449 (6th Cir. 2010).

The Sixth Circuit not only misinterpreted this Court's holding in *McCreary County* but also failed to engage in the analysis required to determine whether the government's stated purpose is plausible or a sham. As this Court said in *McCreary County*, government statements of purpose are generally given deference so that a finding of impermissible religious purpose has been rare. *McCreary County*, 545 U.S. at 863. The Sixth Circuit's finding of impermissible religious purpose conflicts with that precedent and further muddies the already murky waters of Establishment Clause analysis.

A. The Sixth Circuit's Opinion Conflicts With This Court's Conclusion That Past Actions Do Not Forever "Taint" Public Displays Of Historical Expressions Of Religion.

The Sixth Circuit panel acknowledged this Court's holding that the Foundations Displays should not be branded as perpetually impermissible, but then disregarded it when it ruled that the displays still evince a religious

purpose. The panel departed significantly from this Court's reasoning in *McCreary County* and even implied that the Court did not mean what it said when it found that the Foundations Displays were not forever "tainted."

In *McCreary County*, this Court disavowed the notion that government can never evince a secular purpose for displays that include the Ten Commandments, just as it had in *Stone v. Graham*, 449 U.S. 39, 42 (1980) (per curiam). *McCreary County*, 545 U.S. at 868. While the majority questioned why certain documents were included in the Foundations Displays, it did not, as the Sixth Circuit intimates, rule that the contents of the Foundations Displays were *per se* unconstitutional. *Id.* at 872-873. Indeed, this Court never addressed *Lemon*'s effect prong. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Instead, as in *Stone*, the *McCreary County* Court distinguished the posting of the text of the Ten Commandments in isolation from integrated displays that included the Commandments or other parts of the Bible. *McCreary County*, 545 U.S.. at 868-869 (citing *Stone*, 449 U.S. at 42: "This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like"). In *McCreary*

County and *Stone*, this Court found a constitutionally significant difference between posting a solitary copy of the Ten Commandments and posting a copy of the Ten Commandments amid other historical documents.

Similarly, this Court found a constitutionally significant difference between requiring that Creationism be taught in public schools and permitting Creationism to be taught as one of numerous theories on the origins of life in *Edwards v. Aguillard*, 482 U.S. 578, 593-594 (1987). "We do not imply that a legislature could never require that scientific critiques of prevailing scientific theories be taught." *Id.* at 593. "[T]eaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction." *Id.* at 594. "But because the primary purpose of the Creationism Act is to endorse a particular religious doctrine, the Act furthers religion in violation of the Establishment Clause." *Id.*

Implicit in each of these opinions, including *McCreary County*, is the principle that public displays of religious expression are not to be labeled "once tainted always tainted," as the Sixth Circuit has effectively done here. *See also, ACLU v. Schundler*, 168 F.3d 92, 105

(3d Cir. 1999) (opinion by Justice, then Judge, Alito rejecting the notion that an impermissible purpose in one holiday display means subsequent displays are forever "tainted").

Notably, the Sixth Circuit previously recognized that declaring a stand-alone Ten Commandments monument unconstitutional does not mean that the government is forever barred from displaying the Decalogue. *Adland v. Russ,* 307 F.3d 471, 489 (6th Cir. 2002). "[W]e do not hold that the Commonwealth of Kentucky can never display the Ten Commandments or this monument in particular." *Id.* "To the contrary, we believe that the Supreme Court's opinion in *Stone* and Justice Stevens' statements in [*County of Allegheny* not only acknowledge that the Ten Commandments may be constitutionally displayed, they provide considerable guidance [on] how they can be displayed." *Id.* This Court followed the reasoning of *Stone* in *McCreary County*, so the proposition that a Decalogue display can regain constitutional validity remains true. "Thus, even counties such as McCreary and Pulaski, with such an overtly religious purpose in the past, may 'get it right' at some point in the future, based on genuine changes in constitutionally significant conditions." *ACLU of Ky. v. Rowan County*, 513 F. Supp. 2d 889, 897 (E.D. Ky. 2007) (upholding

a Foundations Display erected under circumstances similar to those present here).

Nevertheless, in this case, the Sixth Circuit said that this Court's 2005 finding of an impermissible religious *purpose* for the first and second displays and immediate posting of the Foundations Displays was a finding that the *contents* of the Foundations Displays are unconstitutional. *ACLU v. McCreary County*, 607 F.3d at 449. The panel attempted to qualify its conclusion that "the Supreme Court in *McCreary* has definitively found that the display at issue violates the Establishment Clause, and we are obligated to follow that precedent" by adding, "if no constitutionally significant facts have changed." *Id.* H owever, its footnote chiding the panels that upheld Foundations Displays in Mercer and Grayson counties belies the implication that the panel would uphold the displays if there were changes in "constitutionally significant" facts (whatever that means). *Id.* at 449 n. 5.

> [T]he *Mercer* and *Grayson* opinions essentially ignore the Supreme Court's reliance in *McCreary* on both the content of the display and the evolution of the evidence in determining that Defendants had a religious purpose in posting the Foundations Display. The *Mercer*

> and *Grayson* panels would have us believe that the Supreme Court approved of the content of the Foundations Displays and relied exclusively on the existence of prior displays and past conduct of McCreary County officials in rejecting Defendants' stated purpose as a sham.

Id. at 449 n.5. The Sixth Circuit transformed this Court's reiteration of established precedent –"we do not decide that the Counties' past actions forever taint any effort on their part to deal with the subject matter"–into a meaningless platitude. *See McCreary County*, 545 U.S. at 873-874.

The legal effect of a governmental entity's past alleged unconstitutional conduct is a question of extreme public importance. The Sixth Circuit's opinion conflicts with a prior decision of the same Circuit, the Third and the Seventh Circuits. The opinion holds that the Counties' past conduct concerning the Displays bears directly on the present purpose, and permanently taints any future displays. The opinion conflicts with the Third Circuit's decision in *Schundler*, 168 F.3d at 92 (opinion by Justice, then Judge, Alito, rejecting the ACLU's argument that a prior stand-alone display of a crèche forever tainted a future

display of the crèche containing secular symbols of the holiday), with the Seventh Circuit's decision in *Metzl v. Leininger*, 57 F.3d 618 (7th Cir. 1995) (striking down a Good Friday closing law, Judge Posner reasoned that the State of Illinois could continue with the Good Friday closing by adopting a secular rationale), and with the Sixth Circuit's own opinions in *Granzeier v. Middleton*, 173 F.3d 568 (6th Cir. 1999) (rejecting the argument against a Good Friday closing law that a "sign posted for several days in 1996 irrevocably established an endorsement of religion, from which Defendants cannot retreat"), and *Adland*, 307 F.3d at 489 (noting that a religious purpose in a stand-alone Ten Commandments monument did not preclude a future modified display).

This Court should grant certiorari to correct the error and resolve the conflict between the Sixth Circuit's ruling and established precedent.

B. The Sixth Circuit's Ruling Conflicts With This Court's Precedents Which Have Rarely Rejected Government's Stated Secular Purposes.

While this Court found that the Counties' earlier displays evinced an impermissible religious purpose, it also clarified that rejecting the government's stated secular purpose is more the exception than the rule. *McCreary County*, 545 U.S. at 859. "In the past, the [secular purpose] test has not been fatal very often, presumably because government does not generally act unconstitutionally, with the predominant purpose of advancing religion." *Id.* at 863. The Court often accepts governmental statements of purpose, "in keeping with the respect owed in the first instance to such official claims," and it is only in unusual cases when the state's purpose has been found to be an apparent sham or secondary to a predominately religious purpose. *Id.* at 865.

Up to the time of the *McCreary County* decision, this Court had found government action motivated by an illegitimate purpose only four times since *Lemon*. *McCreary County*, 545 U.S. at 865 (citing *Stone, Edwards, Wallace v, Jaffree*, 472 U.S. 38 (1985) and *Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290 (2000)). nb In each of those cases, and in *McCreary County*, this Court rejected the government's stated secular purpose only after the Court determined that the challenged statute or display did not advance the stated purposes.

The *Stone* court found that the posting of the Ten Commandments in isolation on classroom walls did not advance the state's proffered educational purpose. *Stone*, 449 U.S. at 42. In *Edwards*, this Court found a statute requiring that Creationism be taught was not designed to meet the stated purpose of protecting academic freedom. *Edwards*, 482 U.S. at 586-587. In *Wallace*, this Court found that revision of a moment of silence statute to add the words "or voluntary prayer" did not further the stated purpose of protecting students' rights to voluntarily pray during the school day because the existing law already provided a one-minute moment of silence. *Wallace*, 472 U.S. at 59-60. In *Santa Fe*, this Court again rejected the school district's proffered secular purposes only after determining that the pre-game invocation policy did not change the prior policy and student vote on prayer. *Santa Fe*, 530 U.S. at 309.

In *McCreary County*, this Court noted that the initial stand-alone displays did not convey a secular message, and that the resolutions approving the second displays contained a religious purpose. 545 U.S. at 869-870. The Court stated that because the third display, the Foundations Display, was mounted without adoption of new resolutions, it did not evince a secular purpose notwithstanding the

stated secular purpose affixed to the wall alongside the Display. *Id.* at 870-871. The Court explicitly left open the possibility that the Counties could establish the necessary connection between the Display and secular purpose. *Id.* at 873-874.

McCreary County did not change the principle that "a finding of impermissible purpose should be rare" and made only after a substantive analysis of the facts before the court. *See Grayson County*, 591 F.3d at 853, *Mercer County*, 432 F.3d at 630 (citing *McCreary County*, 545 U.S. at 862-863). While the Sixth Circuit panels in *Grayson County* and *Mercer County* understood and followed that principle, the panel in this case did not. The panel here did not analyze the Counties' 2007 resolutions. *McCreary County*, 607 F.3d at 448. It merely restated this Court's conclusions about the 2005 purpose statements *i.e.*, that they were adopted merely as litigating positions, and 2005 resolutions, *i.e.*, that they were of minimal significance in light of the evolution of the evidence, and ended its inquiry. *Id.* Moreover, the panel here actually criticized the other panels for undertaking a purpose analysis of the Foundations Display, claiming that such an analysis is no longer appropriate after *McCreary County*. *Id.* at 449. That mischaracterization of this Court's precedent and the resulting intra-circuit conflict on a key

aspect of Establishment Clause analysis should be reviewed and resolved by this Court.

II. THE SIXTH CIRCUIT'S OPINION CONFLICTS WITH OTHER SIXTH CIRCUIT OPINIONS ON IDENTICAL DISPLAYS AS WELL AS OPINIONS IN OTHER CIRCUITS UPHOLDING THE SAME DISPLAY AND OTHER RELIGIOUS DISPLAYS.

The Sixth Circuit panel acknowledged that it created an intra-circuit conflict, but blamed the conflict on the other two panels. *ACLU v. McCreary County*, 607 F.3d 439, 448-449 (6th Cir. 2010).[3] Casting blame on the other panels does not change the fact that this panel, not the other panels, misinterpreted this Court's holding in *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005).

The panel's ruling also conflicts with rulings in the Seventh, Eighth and Ninth Circuits which have upheld the same display and even stand-alone Ten Commandments monuments under the Establishment Clause. These inter-circuit conflicts, combined with the

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[3] All of the cases cited in this argument were decided after this Court's 2005 decision in *McCreary County*.

intra-circuit conflict in the Sixth Circuit evince a need to resolve this conflict.

A. The Sixth Circuit's Panel Decision Conflicts With Other Sixth Circuit Decisions Upholding Identical Foundations Of Law Displays.

The Sixth Circuit panels in *ACLU of Ky. v. Grayson County*, 591 F.3d 837 (6th Cir. 2010) and *ACLU of Ky v. Mercer County*, 432 F.3d 624 (6th Cir. 2005) recognized the narrow holding in *McCreary County* and properly analyzed Foundations Displays identical to the Counties' displays here in light of that narrow holding to find that the displays evinced a secular purpose and that the identical displays also satisfied the effect prong of *Lemon*. *Mercer County*, 432 F.3d at 634; *Grayson County*, 591 F. 3d at 854. Unlike the panel in this case, the *Mercer County* and *Grayson County* panels did not merely restate this Court's statements from *McCreary County* and conclude, without analysis, that there was an impermissible religious purpose. Instead, the *Mercer County* and *Grayson County* panels accorded the proper deference to the governments' stated purposes and analyzed the displays to determine whether they advanced the stated purposes. *Mercer County*, 432 F.3d at 633-634;

Grayson County, 591 F. 3d at 853-854. Having found the necessary nexus, the panels properly found that the Foundations Displays did not violate *Lemon's* purpose prong as modified in *McCreary County*. *Mercer County*, 432 F.3d at 634; *Grayson County*, 591 F. 3d at 854. In both cases, the panels recognized the differential history between their displays and the initial Foundations Displays in *McCreary County*, but also acknowledged and followed this Court's admonition that the history of the *McCreary County* displays did not impose an indelible taint upon all future attempts to post Foundations Displays. *Mercer County*, 432 F.3d at 634; *Grayson County*, 591 F. 3d at 853.

In *Mercer County*, the panel examined the context of the display in light of the county's stated purpose under *McCreary County*'s modified predominant purpose test and found that the predominant purpose of the Foundations Display was secular. *Mercer County*, 432 F.3d at 632. "A reasonable observer would not view this display as an attempt by Mercer County to establish religion. Instead, he would view it for what it is: an acknowledgment of history." *Id.* The court dismissed the proposition that a reasonable observer in Kentucky would be aware of the "tainted legislative history" of the Counties' pre-2005 displays and impute that purpose to the Mercer County display. *Id.* Properly

applying this Court's admonition that the past actions do not forever taint future displays, the *Mercer County* panel found no basis for such an imputation. *Id.* "If the counties involved in *McCreary County* may purge themselves of the impermissible purpose, it follows a fortiori that Mercer County may act free of the McCreary County-taint." *Id.* "Furthermore, the sins of one government should not be revisited on other governments." *Id.*

Similarly, the *Grayson County* panel refused to impute any religious "taint" to a Foundations Display identical to the one in *Mercer County* and the one at issue here. *Grayson County*, 591 F.3d at 849. The panel dismissed minor differences in the procedural history between the displays in Mercer County and in Grayson County as inconsequential to the predominant purpose analysis under *McCreary County*. *Id.* at 854. *McCreary County* did not change the presumption that a government's statement of purpose is to be accorded deference. *Id.* at 853. Nor was it constitutionally significant that a minister requested the county officials at a public meeting to post the same display that was upheld in *Mercer County*. "[C]ourts must proceed with caution in attributing an unconstitutional purpose to a government entity," and a finding of impermissible purpose should be rare. *Id.* The Sixth Circuit panel

found that the Foundations Display sent an "unmistakable message of the County's acknowledgment of legal history." *Id.*

In *ACLU v. Rowan County,* 513 F. Supp. 2d 889, 905 (E.D. Ky. 2007), the court reviewed the Rowan County Foundations Display under this Court's decision in *McCreary County* and the Sixth Circuit's decision in *Mercer County.* It found that while Rowan County's history of having the Ten Commandments displayed in isolation suggested that religion might have been *a* purpose for the Foundations Display, it was not the *predominant* purpose. *Id.* (emphasis in original). Therefore, it did not violate the predominant purpose prong of *Lemon* as articulated in *McCreary County. Id.*

The panel here did not engage in the analysis required to ascertain purpose. *ACLU v. McCreary County,* 607 F.3d at 448. The panel did not address the content of the 2007 resolutions, but merely reiterated what this Court said about the 2005 purpose statements–that they were merely litigating positions–and concluded that the displays were still "tainted." *Id.* Notably, in *McCreary County,* this Court said that had those purposes been presented in a resolution that rescinded prior resolutions–which is what the 2007 resolutions do–then the purpose analysis might have been different. *McCreary County,* 545 U.S. at 871-872. The

panel's failure to properly apply *McCreary County* places it at odds with the other Sixth Circuit panels, with *McCreary County*, and with decisions in other circuits. The resulting conflict leaves lower courts and legislators guessing about how to post historical expressions of religion without violating the Establishment Clause. This Court should resolve the conflict and release courts and legislators from Establishment Clause "purgatory." *Mercer County*, 432 F.3d at 636.

B. The Sixth Circuit's Opinion Conflicts With Opinions From The Seventh, Eighth And Ninth Circuits Upholding Public Displays of the Ten Commandments.

The Sixth Circuit's determination that the Counties' Foundations Displays remain "tainted" with a predominantly religious purpose also conflicts with decisions in other circuits upholding Foundations Displays and even stand-alone displays of the Ten Commandments.

The Seventh Circuit found that the identical Foundations Display at issue here satisfied *Lemon*'s purpose prong. *Books v. County of Elkhart*, 401 F.3d 857, 866 (7th Cir. 2005). As this Court did in *McCreary County*,

Stone, Edwards, Wallace, and *Santa Fe*, and the Sixth Circuit did in *Mercer County* and *Grayson County*, the Seventh Circuit emphasized the importance of reviewing both the content and context of a display and the government's stated purposes. *Id.* at 865. As the Sixth Circuit found in *Mercer County* and *Grayson County*, the Seventh Circuit concluded that the identical Foundations Display, "taken as a whole, does not belie the County's asserted secular purpose of exhibiting important historical documents to contribute to the education and moral character of its citizens by instilling a sense of history, civic duty, and responsibility." *Id.* at 866. When the government has adopted a resolution setting forth historical, educational or cultural reasons for a display and the display as a whole reflects those values, then it is reasonable to find that there is a secular purpose. *Id.*

The Eighth and Ninth circuits have found secular purposes underlying stand-alone Ten Commandments monuments, which further illustrates the conflict created by the Sixth Circuit's finding that an integrated display evinces a predominantly religious purpose. *ACLU Nebraska Foundation v. City of Plattsmouth*. 419 F.3d 772 (8th Cir. 2005) (en banc); *Card v. City of Everett*, 520 F.3d 1009 (9th Cir. 2008). In *Plattsmouth*, the en banc court reversed the panel's decision that the

granite stand-alone monument had an impermissible religious purpose under *Lemon*. *Plattsmouth*, 419 F.3d at 775. The en banc court relied upon *Van Orden v. Perry*, 545 U.S. 677 (2005) to reverse the panel's decision, but found that the conclusion would be same under *Lemon*, based upon the reasons set forth by the dissent in the panel opinion. *Id.* at 778 n.8 (citing *ACLU Nebraska Foundation v. City of Plattsmouth,* 358 F.3d 1020, 1043-50 (8th Cir. 2004) (Bowman, J. dissenting)). In that dissenting opinion adopted by the en banc court, Judge Bowman rejected the panel's finding that an impermissible religious purpose was imputed to the city because of the perceived religious purpose of the monument's donors decades before and the fact that the display consisted of the Ten Commandments. *Plattsmouth,* 358 F. 3d at 1044. As the en banc court implicitly recognized, such an imputed religious purpose is not acceptable even after *McCreary County*. *See Plattsmouth* (en banc), 419 F.3d at 778 n.8.

Similarly, the Ninth Circuit refused to impute a religious purpose from the past unto a present display when it upheld a stand-alone monument in *Card*, 520 F.3d at 1020. The Ninth Circuit applied *Van Orden,* but like the en banc court in *Plattsmouth,* implicitly recognized that this Court's statement that religious purpose in an initial display does not

"forever taint" future displays means that a court should not reach back in time and graft a past religious purpose onto a present display. *See McCreary County*, 545 U.S. at 873-874.

The Sixth Circuit's determination that an impermissible religious purpose continues to permeate the Counties' Foundations Displays creates a conflict that leaves lower courts and legislators standing on shaky ground when trying to create or analyze constitutionally valid public displays that incorporate historic expressions of religion. This Court should accept review to resolve the conflict.

III. THE CONFLICT CAUSED BY THE SIXTH CIRCUIT'S OPINION DEMONSTRATES THE URGENT NEED TO REPLACE *LEMON* WITH AN OBJECTIVE, WELL-DEFINED STANDARD FOR ESTABLISHMENT CLAUSE ANALYSIS OF PASSIVE RELIGIOUS DISPLAYS.

The turmoil caused by the Sixth Circuit's decision is symptomatic of the pervasive conflict and confusion spawned by the inconsistently applied and ill-defined test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The intra-circuit and inter-circuit conflicts created by the Sixth Circuit's ruling here illustrate what Justice Thomas called the "incoherence of

the Court's decisions in this area." *See Van Orden v Perry,* 545 U.S. 677, 694 (2005) (Thomas, J. concurring in judgment). Courts and legislators continue to wrestle with whether *Lemon* will be applied to public displays, if *Lemon* is not used, then which test will be used, or if *Lemon* is used, then how its factors will be defined. The Sixth Circuit's decision here only creates further confusion by adding more walls to the Establishment Clause maze. But, the problem with Lemon originates with this Court, and this Court should accept this case for review and resolve the problem.

The decision in *McCreary County* presents a classic example of the confusion this Court has caused by relying upon *Lemon.* Argued and decided on the same day, this Court in a 5-4 decision used *Lemon* to strike down an historical display that contained the Ten Commandments, but in a 4-1-4 plurality decision upheld a stand-alone Ten Commandments monument without ever citing *Lemon. Compare McCreary County*, 545 U.S. at 870-871 with *Van Orden*, 545 U.S. at 677.

Justice Scalia observed that "[a]s bad as the *Lemon* test is, it is worse for the fact that, since its inception, its seemingly simple mandates have been manipulated to fit whatever result the Court aimed to achieve." *McCreary County*, 545 U.S. at 900 (Scalia, J.

dissenting). That the Sixth Circuit panel here could manipulate the *Lemon* test to reach a conclusion on the same Foundations Display that conflicts with two other panels of the same Circuit illustrates the havoc caused by *Lemon*. "Our jurisprudential confusion has led to results that can only be described as silly." *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 45 n. 1 (2004) (Thomas, J. concurring). "Silly" is one way to describe the incongruous results between the panel decision here, the decisions in *Mercer County* and *Grayson County*, the Seventh Circuit opinion in *Books*, and the numerous district court opinions reaching inconsistent results regarding identical Foundations Displays. *See e.g., Rowan County*, 513 F.Supp. 2d at 905 (upholding Foundations Display); *ACLU v. Garrard County* 517 F. Supp. 2d 925 (ED Ky 2007) (finding disputed facts regarding the purpose and effect of the Foundations Display); *ACLU v. Rutherford County*, 2006 WL 2645198 (M.D. Tenn. 2006) (denying a permanent injunction against the Foundations Display).

The *Lemon* test should be abandoned and this Court's Establishment Clause jurisprudence transformed from a labyrinth into an objective, constitutionally appropriate test that provides lower courts and legislators with proper guidance.

A. *Lemon* Is Not Consistently Used And There Are No Guidelines To Determine When It Should Be Used.

This Court need look no further than its opinion in *Van Orden* to witness the inconsistent application of the *Lemon* test that has contributed to the "hopeless disarray" and "jurisprudential confusion" of this Court's Establishment Clause cases. *Newdow*, 542 U.S. at 45 n. 1 (Thomas, J. concurring). Having just resurrected and revamped the *Lemon* test in *McCreary County*, the Court ignored the test on the same day in *Van Orden*, 545 U.S. at 687. "Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation's history." *Id.* The Court did not explain how the six-foot tall granite monument on the grounds of the Texas State Capitol was more of a "passive" monument than was the Decalogue posted by the Counties as one of eleven equally sized frames, nor why the Texas monument was an acceptable illustration of "the rich American

tradition of religious acknowledgments" but the Counties' displays were not. *Id.* at 690.

In 2005, this Court used *Lemon* in only one of the three Establishment Clause cases.[4] Since then, this Court has not squarely addressed an Establishment Clause challenge, and therefore has not relied upon *Lemon.* This leaves lower courts and legislators in the dark about whether *Lemon* has been implicitly abandoned. This Court should accept review to illuminate lower courts and legislators and declare that *Lemon* is no longer the standard for analyzing Establishment Clause challenges.

The confusion created by the contemporaneous conflicting decisions in *McCreary County* and *Van Orden* and subsequent silence regarding *Lemon* was cogently described by the Ninth Circuit in *Card*, 520 F. 3d at 1016:

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[4] The Court did not use *Lemon* in 2005 when it upheld the Religious Land Use and Institutionalized Persons Act in a decision handed down on May 31, 2005. *Cutter v. Wilkenson*, 544 U.S. 709 (2005). Then, on June 27, 2005, this Court used *Lemon* in *McCreary County*, but did not use *Lemon* in *Van Orden*. *McCreary County*, 545 U.S. at 844; *Van Orden*, 545, U.S. at 677.

> Our study of the cases leads us to two conclusions. First, that the three-part test set forth in *Lemon* and modified in *Agostini* remains the general rule for evaluating whether an Establishment Clause violation exists. Second, that we do not use the *Lemon* test to determine the constitutionality of some longstanding plainly religious displays that convey a historical or secular message in a non-religious context. Because the Supreme Court issued *McCreary*, broadly espousing *Lemon*, contemporaneously with *Van Orden*, narrowly eschewing *Lemon*, we must read the latter as carving out an exception for certain Ten Commandments displays. We cannot say how narrow or broad the 'exception' ma y ultimately be; not all Ten Commandments displays will fit within the exception articulated by Justice Breyer.

That proved true one year later when the Tenth Circuit did not apply *Van Orden* to a concrete Ten Commandments display, but invalidated it under *Lemon*. *Green v. Haskell County Bd of Comm'rs,* 568 F.3d 784, (10th Cir. 2009), *reh'g*

en banc denied, 574 F.3d 1235 (10th Cir. 2009). The Eighth Circuit, like the Ninth, has used *Van Orden* to uphold concrete Decalogue monuments. *Plattsmouth*, 419 F.3d at 776-777. *See also, Twombly v. City of Fargo*, 388 F.Supp. 2d 983, 986-990 (D. ND 2005) (applying *Van Orden* to validate a concrete Ten Commandments monument).

The application of *Lemon* to the display in *McCreary County* and immediate exemption from *Lemon* in *Van Orden* is merely the latest example of the inconsistent application and tenuous viability of *Lemon* as a standard for Establishment Clause analysis in this context. Twelve years before *McCreary County* and *Van Orden*, Justice Scalia said:

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under: Our decision in *Lee v. Weisman*, 505 U.S. 577, 586-587,

> 112 S.Ct. 2649, 2654, 120 L.Ed.2d 467 (1992), conspicuously avoided using the supposed "test" but also declined the invitation to repudiate it.

Lamb's Chapel v. Central Moriches Union Free School Dist., 508 U.S. 384, 398 (1993) (Scalia, J. concurring in the judgment).

> The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it, *see, e.g., Aguilar v. Felton*, 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985) (striking down state remedial education program administered in part in parochial schools); when we wish to uphold a practice it forbids, we ignore it entirely, *see Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983) (upholding state legislative chaplains). Sometimes, we take a middle course, calling its three prongs "no more than helpful signposts," *Hunt v. McNair*, 413 U.S. 734, 741, 93 S.Ct. 2868, 2873,

> 37 L.Ed.2d 923 (1973). Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.

Id. at 399. *Lemon* largely remained dormant between *Lamb's Chapel* (1993) and *McCreary County* (2005) as this Court failed to apply it in several Establishment Clause cases, including *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995), *Agostini v. Felton*, 521 U.S. 203 (1997), and, only a few weeks before *McCreary County* in *Cutter*, 544 U.S. 709.

In *McCreary County* the Court not only woke the sleeping monster, but also re-energized its purpose prong, turning what was a limited, deferential inquiry into "a rigorous review of the full record" to search for a predominantly religious purpose. *McCreary County*, 545 U.S. at 902 (Scalia, J. dissenting). It then promptly anesthetized it the same day in *Van Orden*, 545 U.S. at 687. However, since *Van Orden* only anesthetized *Lemon*, it continues to haunt judicial chambers, inserting itself willy-nilly into opinions, keeping lower courts and legislators guessing as to when it might appear again to pronounce judgment on public displays of religious expression. Since the decisions do not offer definitive standards for when *Lemon* should be applied, no one

knows when their display might be subject to its haunting. While such mystery might make for good late-night television, it makes for a hopelessly incoherent and unintelligible constitutional standard. *See Van Orden*, 545 U.S. at 694, 697 (Thomas, J. concurring in judgment). And while this Court is free to take *Lemon* out of the tomb and put it back at will, lower courts are not so free. They are left to struggle with the monster. Even worse, government officials not trained in the law are hopelessly confused.

B. *Lemon*'s Problems Are Exacerbated By The Absence Of Clear Definitions Of The Component Factors.

Justice Scalia's observation that "[a]s bad as the *Lemon* test is, it is worse for the fact that, since its inception, its seemingly simple mandates have been manipulated to fit whatever result the Court aimed to achieve," illustrates why, even when it appears that *Lemon* is the appropriate standard, the analysis is still hopelessly confusing. *McCreary County*, 545 U.S. at 901 (Scalia, J. dissenting). The test went from the initial three-part test of purpose, effect and entanglement to a two-part test of purpose and effect, which then became endorsement, *Lynch v. Donnelly*, 465 U.S. 668, 691-692 (1984) (O'Connor, J. concurring), to a

two-part test of predominant purpose and endorsement in *McCreary County*. None of those iterations, however, has offered clear definitions of the underlying factors. Governments are vulnerable to the subjective leanings of lower courts unfettered by the bounds of objective definition. As Justice Thomas observed: "The unintelligibility of this Court's precedent raises the further concern that, either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections." *Van Orden,* 545 U.S. at 697 (Thomas, J. concurring in judgment). "The outcome of constitutional cases ought to rest on firmer grounds than the personal preferences of judges." *Id.* Examination of this Court's precedents reveals the truth of Justice Thomas' assessment.

1. The ill-defined purpose prong has been made worse by McCreary County's modification.

McCreary County's reformulation of the purpose prong into the predominant purpose test has added another layer of uncertainty to what was already an uncertain standard. "By shifting the focus of *Lemon*'s purpose prong from the search for a genuine, secular motivation to the hunt for a predominantly religious purpose, the [*McCreary County*] Court converts what has in the past been a fairly

limited inquiry into a rigorous review of the full record." *McCreary County*, 545 U.S. at 902-903 (Scalia, J., dissenting). That shift in focus has only exacerbated the problems inherent in *Lemon*. Courts now must review the context and history of each challenged action to determine whether that particular act is "predominantly religious" without knowing what constitutes a "predominantly religious purpose." *See id.* Not surprisingly, this has led to inconsistent results that have only made Establishment Clause jurisprudence more confusing than ever.

The Ninth Circuit's analysis of the words "under God" in the Pledge of Allegiance illustrates the confusion caused by the heightened but still undefined purpose analysis. *Newdow v. Rio Linda School Dist.*, 597 F.3d 1007, 1021 (9th Cir. 2010). The Ninth Circuit reviewed the rulings in *McCreary County* and *Van Orden* and tried to reconcile the inconsistencies in its conclusion about "Under God" in the pledge. The court reasoned that the word "Lord" in the Counties' initial Ten Commandments display was improper because it was surrounded only by other words with an "unstinting focus" on religion, but the same word "Lord" in the Ten Commandments was acceptable in *Van Orden* because it was surrounded by other monuments and historical objects. *Id.* "Likewise, the phrase 'one Nation

under God' in the Pledge appears as part of a pledge of allegiance to 'the Flag of the United States of America, and to the Republic for which it stands,' not a personal pledge of allegiance to God," and therefore was acceptable under the reasoning of *Van Orden*. *Id.* at 1022-1023.

One Tenth Circuit panel found that the pictograph of three crosses, including one cross that was larger than the others, did not evince a "predominant religious purpose" under *McCreary County* because it related to the name of the city, Las Cruces, meaning, the crosses, which in turn, was reflective of secular historical events. *Weinbaum v. City of Las Cruces*, 541 F. 3d 1017, 1033-1034 (10th Cir. 2008). However, another panel said that a granite Ten Commandments monument substantially similar to the monument upheld in *Van Orden* did exhibit a "predominantly religious purpose" under *McCreary County*. *Green*, 568 F.3d at 801.

The Sixth Circuit's decision here also elucidates the problem. The panel acknowledged that the prior impermissible purpose could be changed by "constitutionally significant" circumstances. Without defining "constitutionally significant" circumstances, the panel said that changes in personnel, passage of time with no posted display and new

resolutions renouncing all prior purposes did not fit the definition. *ACLU v. McCreary County*, 607 F.3d 439, 448 (6th Cir. 2010). The Counties are left with having to discern what the panel thinks would constitute "constitutionally significant" circumstances sufficient to evince a permissible secular purpose. This epitomizes Justice Scalia's observation in *McCreary County*:

> What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle. That is what prevents judges from ruling now this way, now that–thumbs up or thumbs down—as their personal preferences dictate. Today's opinion forthrightly (or actually, somewhat less than forthrightly) admits that it does not rest upon consistently applied principle.

McCreary County, 545 U.S. at 890-891 (Scalia, J., dissenting). The same is true of the Sixth Circuit's decision, which demonstrates why this Court should accept certiorari and overrule *Lemon*.

2. The "objective observer" standard is not consistently defined even among members of this Court.

Defining the "objective observer" has proven even more problematic than has defining purpose. The statement that "[t]he eyes that look to purpose belong to an 'objective observer,' one who takes account of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act," *id.* at 862, has spawned conflicts even among the members of this Court in the same case.

In *County of Allegheny,* Justice O'Connor said the reasonable observer would appreciate a display featuring a menorah and Christmas tree as an effort to acknowledge cultural diversity and tolerance of religious belief or non-belief. *County of Allegheny v. ACLU,* 492 U.S. 573, 635-636 (1989) (O'Connor, J. concurring). Justice Brennan said the reasonable observer could not overlook the "religious significance" of a Christmas tree placed next to a menorah. *Id.* at 641 (Brennan, J., concurring in part and dissenting in part).

In *Lynch*, Justice O'Connor found that a reasonable observer would not view the city's

Christmas display that included a crèche, Santa Claus house, reindeer, candy-striped poles, a Christmas tree and carolers as endorsing religion. *Lynch,* 465 U.S. at 692 (O'Connor, J., concurring). Justices Brennan, Marshall, Blackmun and Stevens disagreed: "For many, the City's decision to include the crèche as part of its extensive and costly efforts to celebrate Christmas can only mean that the prestige of the government has been conferred on the beliefs associated with the crèche, thereby providing 'a significant symbolic benefit to religion....' *Id.* at 701 (Brennan, J. dissenting).

Justice Scalia observed that the "objective observer" test has created "invited chaos" as Justices have adopted varying definitions for the observer, or "hypothetical beholder." *Pinette*, 515 U.S. at 768 n.3. There is "any beholder (no matter how unknowledgeable)," "the average beholder," and "the 'ultra-reasonable' beholder." *Id.* "And, of course, even when one achieves agreement upon that question, it will be unrealistic to expect different judges (or should it be juries?) to reach consistent answers as to what any beholder, the average beholder, or the ultra-reasonable beholder (as the case may be) would think. It is irresponsible to make the Nation's legislators walk this minefield." *Id.*

The Sixth Circuit's decision has made the minefield more treacherous. Legislators not only have to ascertain which definition of observer is appropriate, but also the extent of his memory and what actions are sufficient to neutralize any prior religious recollections. A wrong step on any of these issues triggers litigation. This Court should accept review and provide legislators with a safe path in the form of an objective and easily understood standard for analyzing Establishment Clause challenges to public displays of religious expression.

CONCLUSION

The panel's decision conflicts with *McCreary County* and other precedents from this Court, with decisions from other panels in the Sixth Circuit and with decisions in the Seventh, Eighth and Ninth Circuits. The decision exemplifies the pervasive conflict caused by continued reliance upon the *Lemon* test, particularly since its modification by this Court in *McCreary County*. For these reasons, this Court should grant certiorari and overturn the Sixth Circuit's decision.

October 2010.

Respectfully Submitted,

Mathew D. Staver
(Counsel of Record)
Anita L. Staver
Horatio G. Mihet
LIBERTY COUNSEL
1055 Maitland Center
Commons, 2d Floor
Maitland, FL 32751
(800) 671-1776
court@lc.org

Stephen M. Crampton
Mary E. McAlister
David M. Corry
LIBERTY COUNSEL
PO Box 11108
Lynchburg, VA 24506
(434) 592-7000
court@lc.org
Attorneys for
Petitioners

APPENDIX

United States Court of Appeals,
Sixth Circuit.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY; Louanne Walker; David Howe; Sarah Doe and Thomas Doe, on behalf of themselves and their minor child, Jane Doe; Lawrence Durham; Paul Lee, Plaintiffs-Appellees,

v.

McCREARY COUNTY, KENTUCKY; Pulaski County, Kentucky, Defendants-Appellants.

No. 08-6069.

Argued: Oct. 20, 2009.

Decided and Filed: June 9, 2010.
Rehearing and Rehearing En Banc Denied July 29, 2010.

Before: RYAN, CLAY, and GIBBONS, Circuit Judges.

CLAY, J., delivered the opinion of the court. GIBBONS, J. (pp. 451-52), delivered a separate concurring opinion. RYAN, J. (p. 452), delivered a separate dissenting opinion.

OPINION

CLAY, Circuit Judge.

Defendants, McCreary County, Kentucky, Pulaski County, Kentucky, and officials from these counties, appeal from the district court order granting Plaintiffs' motion to alter or amend judgment, granting a permanent injunction prohibiting Defendants from displaying the three contested Ten Commandments displays, and construing Defendants' renewed motion for summary judgment as one for relief from final judgment. For the reasons set forth below, we AFFIRM the district court's order.

BACKGROUND

In 1999, McCreary County and Pulaski County, Kentucky erected displays consisting of framed copies of the Ten Commandments in their county courthouses.[1] In response, Plaintiffs

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[1] In addition, Harlan County, Kentucky erected displays of the Ten Commandments in the classrooms of its schools. However, the classroom displays are no longer at issue in this case. For a full recitation of the facts and history of this litigation, see *ACLU of Ky. v. McCreary County, Ky.*, 145 F.Supp.2d 845

filed lawsuits, seeking preliminary injunctions that would require the removal of the displays based on violations of the Establishment Clause of the First Amendment.[2]

Shortly after the complaint was filed and prior to a ruling in the district court on Plaintiffs' request for a preliminary injunction, Defendants altered their displays "in an attempt to bring the display[s] within the parameters of the First Amendment and to insulate themselves from suit." *ACLU of Ky. v. McCreary County, Ky.*, 96 F.Supp.2d 679, 684 (E.D.Ky.2000) (" *McCreary I* "). The second set of displays posted in the courthouses included large copies of the Ten Commandments along with smaller copies of eight other documents, which were religious in nature.

Specifically, the Courthouse displays were modified to consist of: (1) an excerpt from the

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(E.D.Ky.2001) (" *McCreary II* "), *aff'd*, 354 F.3d 438 (6th Cir.2003) (" *McCreary III* "), *aff'd*, 545 U.S. 844, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005) (" *McCreary IV* ").

[2] Plaintiffs initially filed three lawsuits, but they were consolidated and treated as one by the district court and this Court on the initial appeal. We continue to treat them as one lawsuit for purposes of this appeal.

Declaration of Independence; (2) the Preamble to the Constitution of Kentucky; (3) the national motto of "In God We Trust"; (4) a page from the Congressional Record of Wednesday, February 2, 1983, Vol. 129, No. 8, declaring it the Year of the Bible and including a copy of the Ten Commandments; (5) a proclamation by President Abraham Lincoln designating April 30, 1863 a National Day of Prayer and Humiliation; (6) an excerpt from President Lincoln's "Reply to Loyal Colored People of Baltimore upon Presentation of a Bible" reading, "The Bible is the best gift God has ever given to man."; (7) a proclamation by President Ronald Reagan marking 1983 the Year of the Bible; and (8) the Mayflower Compact. *McCreary III,* 354 F.3d at 442. Defendants also passed new resolutions authorizing the second set of displays ("the 1999 resolutions"), which emphasized the importance of religion in historical documents of the United States and encouraged the County Judge Executive to "post the Ten Commandments as the precedent legal code upon which the civil and criminal codes of the Commonwealth of Kentucky are founded." (Dist. Ct. R.E. 119 Ex. B). On May 5, 2000, the district court granted Plaintiffs' motion for a preliminary injunction, ordering that Defendants remove the second displays "immediately" and not erect "similar displays" in the future. *McCreary I,* 96 F.Supp.2d at 691.

In response to the district court's ruling, the counties removed the second set of displays, voluntarily dismissed an appeal from the initial preliminary injunction, and posted a third set of displays entitled the Foundations of Law and Government Displays ("Foundations Displays"). The third displays contained nine documents of equal size, including the Ten Commandments, along with one page of explanatory phrases to accompany each of the nine other documents. Specifically,

> [t]he new courthouse displays consisted of the entire Star Spangled Banner, the Declaration of Independence, the Mayflower Compact, the Bill of Rights, the Magna Carta, the National Motto, the Preamble to the Kentucky Constitution, the Ten Commandments, Lady Justice and a one-page prefatory document entitled "The Foundations of American Law and Government Display." ... The prefatory description states that the "display contains documents that played a significant role in the foundation of our system of law and government." ... With regard to the Ten Commandments, the prefatory description states:
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> > The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the

> Declaration of Independence, which declared that, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.
>
> There is no other discussion of the Ten Commandments and how it purportedly relates to any of the other documents in the display.

McCreary III, 354 F.3d at 443. At the time the Foundations Displays were erected, the counties did not repeal the 1999 resolutions, which were passed just months earlier, or pass new resolutions authorizing the third displays. On June 22, 2001, the district court granted Plaintiffs' motion for a supplemental preliminary injunction to include the third displays. On December 18, 2003, this Court affirmed.

On October 12, 2004, the Supreme Court granted Defendants' petition for certiorari.[3] On

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[3] Defendants sought certiorari on the following issues:

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1. Whether the Establishment Clause is violated by a privately donated display on government property that includes eleven equal size frames containing an explanation of the display along with nine historical documents and symbols that played a role in the development of American law and government where only one of the framed documents is the Ten Commandments and the remaining documents and symbols are secular.

2. Whether a prior display by the government in a courthouse containing the Ten Commandments that was enjoined by a court permanently taints and thereby precludes any future display by the same government when the subsequent display articulates a secular purpose and where the Ten Commandments is a minority among numerous other secular historical documents and symbols.

3. Whether the Lemon test should be overruled since the test is unworkable and has fostered excessive confusion in Establishment Clause jurisprudence.

4. Whether a new test for Establishment Clause purposes should be set forth by this Court when the government displays or recognizes historical expressions of religion.

March 8 and March 10, 2005, after oral argument but before the Supreme Court issued a decision, the counties passed new resolutions ("the 2005 resolutions"), which repealed and repudiated the 1999 resolutions authorizing the second displays. On June 27, 2005, the Supreme Court upheld the preliminary injunction on the basis that Defendants exhibited an unconstitutional religious purpose in posting the Foundations Displays. The Supreme Court viewed the repeal of the 1999 resolutions as "acts of obviously minimal significance in the evolution of the evidence." *McCreary IV,* 545 U.S. at 872 n. 19.

After the Supreme Court issued its opinion, the case returned to the district court for further proceedings. The district court entered a scheduling order containing, among other things, discovery and dispositive motion deadlines. After discovery closed, both sides submitted motions for summary judgment. Between the Supreme Court decision in June of 2005 and the filing of the motions for summary judgment in January and February of 2007, the parties merely conducted discovery as to the factual details and motivation for the sequence of the displays. Defendants made no changes to the Foundation Displays, nor did they pass any

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Petition for Writ of Certiorari, *McCreary IV,* 2004 WL 1427470, at *i (June 21, 2004).

new resolutions concerning the purpose of the displays.

On September 28, 2007, the district court denied both Plaintiffs' and Defendants' motions for summary judgment. In denying Plaintiffs' motion for a permanent injunction against the Foundation Displays, the district court held that the constitutional violation is not "continuing" as required by the standard for a permanent injunction because "it is possible to purge the taint of the impermissible religious purpose." (Dist. Ct. R.E. 153 at 10). However, the district court also denied Defendants' motion for summary judgment, holding that the counties had not taken any actions since the Supreme Court decision that showed a change in their predominantly religious purpose; thus, Defendants' actions in posting the Foundations Displays continued to violate the Establishment Clause. Despite the district court's holding that neither Plaintiffs nor Defendants were entitled to judgment as a matter of law, the court also found that no triable issues of fact remained and referred the case to the magistrate judge for a settlement conference.

On October 9, 2007, in response to the district court's finding that Defendants continued to violate the Establishment Clause, Defendants enacted new resolutions regarding

the Foundations Displays ("the 2007 resolutions"). The 2007 resolutions stated the educational and historical purpose of the Foundations Displays and expressly disclaimed any attempt to endorse religion. On October 15, 2007, Plaintiffs filed a timely motion under Federal Rules of Civil Procedure 59 and 60 to alter or amend the court's September 28, 2007 judgment denying Plaintiffs' motion for summary judgment. On October 30, 2007, Defendants filed a renewed motion for summary judgment in light of the 2007 resolutions. Plaintiffs moved to strike Defendants' renewed motion on November 19, 2007, because Defendants had filed the motion more than one year after the dispositive motion deadline and had attempted to admit new evidence more than one year after the close of discovery.

On August 4, 2008, the district court: (1) granted Plaintiffs' motion to alter or amend judgment, (2) denied Plaintiffs' motion to strike Defendants' motion for summary judgment and directed Plaintiffs to file a response, and (3) construed Defendants' motion for summary judgment as one of relief from final judgment. In altering its judgment under Rule 59(e), the district court declared the Foundation Displays unconstitutional and permanently enjoined Defendants from displaying all three displays in the county courthouses based on the court's

finding that the Foundations Displays continued to violate the Establishment Clause as of its September 28, 2007 order. The district court also ruled that its order was final and appealable. On September 2, 2008, Defendants filed their timely notice of appeal from the district court's final judgment. On September 30, 2008, the district court dismissed without prejudice what it deemed to be Defendants' motion for relief from judgment on the ground that the court had lost jurisdiction over the motion when Defendants filed their appeal. Defendants filed no notice of appeal from the district court's denial of their relief from judgment.

DISCUSSION

I. Permanent Injunction Standard

This appeal differs from the last time we heard this case in that we are reviewing the district court's grant of a permanent injunction rather than a preliminary injunction.

In evaluating a district court's grant of a permanent injunction, we review its factual findings under a clearly erroneous standard, its legal conclusions de novo, and the scope of injunctive relief under an abuse of discretion standard. *Women's Med. Prof'l Corp. v. Baird,* 438 F.3d 595, 602 (6th Cir.2006).

In general, "[t]he standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that [for a preliminary injunction] the plaintiff must show a likelihood of success on the merits rather than actual success." *Amoco Prod. Co. v. Village of Gambell,* 480 U.S. 531, 546 n. 12, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987) (internal citations omitted). In the context of this case, "a party is entitled to a permanent injunction if it can establish that it suffered a constitutional violation and will suffer 'continuing irreparable injury' for which there is no adequate remedy at law." *Baird,* 438 F.3d at 602 (citing *Kallstrom v. City of Columbus,* 136 F.3d 1055, 1067 (6th Cir.1998)).

II. Disposition of Permanent Injunction

As was true the last time we heard this matter, the governing standard for determining whether a particular government action violates the Establishment Clause remains *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). Despite Defendants' attempts to persuade the Supreme Court to abandon the inquiry into legislative purpose, the Supreme Court confirmed that the Lemon test remains the appropriate inquiry. *See McCreary IV,* 545 U.S. at 861-64, 125 S.Ct. 2722. Under the *Lemon* test, as originally

formulated, reviewing courts must consider whether (1) the government activity in question has a secular purpose, (2) the activity's primary effect advances or inhibits religion, and (3) the governmental activity fosters an excessive entanglement with religion. *Lemon,* 403 U.S. at 612-13, 91 S.Ct. 2105.

The touchstone of a reviewing court's analysis under the Establishment Clause requires "government neutrality between religion and religion, and between religion and nonreligion." *McCreary IV,* 545 U.S. at 860, 125 S.Ct. 2722 (quoting *Epperson v. Arkansas,* 393 U.S. 97, 104, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968)).

In analyzing purpose under the first prong of the *Lemon* test, "[t]he eyes that look to purpose belong to an 'objective observer,' one who takes account of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act." *Id.* at 862, 125 S.Ct. 2722 (quoting *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 308, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000) (quoting *Wallace v. Jaffree,* 472 U.S. 38, 76, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985))). See also *Edwards v. Aguillard,* 482 U.S. 578, 594-95, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987). "[A]lthough a legislature's stated reasons will generally get deference, the

secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary IV,* 545 U.S. at 864, 125 S.Ct. 2722. Thus, the government violates the Establishment Clause when it acts with the "predominant purpose of advancing religion." *Id.* at 860, 125 S.Ct. 2722.

Furthermore, the objective observer is considered to have "reasonable memories," and Supreme Court precedents "sensibly forbid an observer 'to turn a blind eye to the context in which [the] policy arose.' " *Id.* at 866, 125 S.Ct. 2722 (quoting *Santa Fe,* 530 U.S. at 315, 120 S.Ct. 2266). Thus, reviewing courts must look with the eye of an observer "familiar with the history of the government's actions and competent to learn was history has to show." *Id.* (citing *Santa Fe,* 530 U.S. at 308, 120 S.Ct. 2266). As a consequence, "the same governmental action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage." *Id.* at 866 n. 14, 125 S.Ct. 2722 ("where one display has a history manifesting sectarian purpose that the other lacks, it is appropriate that they be treated differently, for the one display will be properly understood as demonstrating a preference for one group of religious believers as against another").

As an initial matter, given that

Defendants' brief challenges only the permanent injunction against the Foundations Display, we affirm the permanent injunction as to the first and second displays. We further find that the district court did not err in permanently enjoining the Foundations Displays based on its finding that Defendants' actions in posting these displays continued to violate the Establishment Clause as of its September 28, 2007 order.

The district court properly found that no facts affecting the purpose analysis had changed between the Supreme Court decision finding an improper religious purpose in June of 2005 and the filing of the motions for summary judgment on remand in January and February of 2007. In that time, Defendants made no changes to the content or context of the Foundation Displays, nor did they pass any new resolutions concerning the purpose of the displays. The Supreme Court found the content of the Foundation Displays, in conjunction the evolution of evidence, to reveal Defendants' religious purpose in posting the displays. According to the Court, the puzzling choices that the counties made concerning which documents to include in the displays and which documents to omit would probably lead an objective observer to "suspect that the Counties were simply reaching for any way to keep a religious document on the walls of courthouses

constitutionally required to embody religious neutrality." *McCreary IV,* 545 U.S. at 873, 125 S.Ct. 2722.[4] Likewise, on remand, the "objective

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[4] According to the Supreme Court:

> the selection of posted material [does not] suggest a clear theme that might prevail over evidence of the continuing religious object. In a collection of documents said to be "foundational" to American government, it is at least odd to include a patriotic anthem, but to omit the Fourteenth Amendment, the most significant structural provision adopted since the original Framing. And it is no less baffling to leave out the original Constitution of 1787 while quoting the 1215 Magna Carta even to the point of its declaration that "fish-weirs shall be removed from the Thames." *Id.*, at 205a, ¶ 33. If an observer found these choices and omissions perplexing in isolation, he would be puzzled for a different reason when he read the Declaration of Independence seeking confirmation for the Counties' posted explanation that the Ten Commandments' "influence is clearly seen in the Declaration," *id.*, at 180a; in fact the observer would find that the Commandments are sanctioned as divine imperatives, while the Declaration of Independence holds that the authority of government to enforce the law derives "from the consent of the governed," *id.*, at 190a.

observer" who has reasonable memories would have seen the same Foundations Displays posted in the courthouses with the same set of resolutions authorizing the displays, and would have instantly recognized the same religious purpose that Defendants articulated during the previous round of litigation. *See also Santa Fe,* 530 U.S. at 315, 120 S.Ct. 2266 (holding that a school district's history of non-compliance with the Establishment Clause must be considered in determining whether the school district's latest iteration of the challenged policy was constitutional).

Defendants attempt to argue that because the 2005 resolutions, which adopted educational purposes for the Foundations Displays and repealed the 1999 resolutions containing explicit religious purpose statements, were passed after the Supreme Court heard oral arguments, the Supreme Court did not have a chance to adequately consider the context of the 2005 resolutions or their effect in eradicating the improper religious purpose. However, despite the fact that the counties passed these resolutions after briefing and oral argument, the Supreme Court still considered them in deciding that the counties had not eliminated the improper

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McCreary IV, 545 U.S. at 872-73, 125 S.Ct. 2722.

religious purpose. In the context of the overall evolution of the displays, the Supreme Court found that the counties' new unwritten statements of purpose "were presented only as a litigating position" and that the new 2005 written resolutions were "acts of obviously minimal significance in the evolution of the evidence." *McCreary IV,* 545 U.S. at 871, 872 n. 19, 125 S.Ct. 2722. *See also Adland v. Russ,* 307 F.3d 471, 481 (6th Cir.2002) (finding that Kentucky's clarification of its Ten Commandments display only after it was in the midst of litigation was probative of the Commonwealth's religious purpose).

In support of their argument that the 2005 resolutions evince a secular purpose, Defendants argue that the Supreme Court merely mentioned the 2005 resolutions in a footnote and that a reviewing court should generally defer to a legislature's stated intent unless it is determined to be a "sham." But Defendants have failed to show why the district court should have attributed more significance to the 2005 resolutions than did the Supreme Court in determining the purpose of the displays. The Supreme Court considered the 2005 resolutions when the Court made its decision, and the Supreme Court's assessment of the 2005 resolutions became the law of the case, which we are obligated to follow. *See Niemi v. NHK Spring Co., Ltd.,* 543 F.3d 294,

308 (6th Cir.2008) (citing *Scott v. Churchill,* 377 F.3d 565, 569 (6th Cir.2004); *Rouse v. DaimlerChrysler Corp. UAW,* 300 F.3d 711, 715 (6th Cir.2002)) ("[u]nder the law-of-the-case doctrine, rulings made at one point in the litigation should continue to govern in subsequent stages of that litigation").

The district court was in no position on remand to assume that the Supreme Court did not do its job and did not afford the resolutions the proper weight. The district court was correct to take its direction from the Supreme Court, not from Defendants' bare assertion that the 2005 resolutions eradicated the improper religious purpose. Lower courts are "obligated to follow Supreme Court dicta, particularly where there is not substantial reason for disregarding it, such as age or subsequent statements undermining its rationale." *United States v. Marlow,* 278 F.3d 581, 588 n. 7 (6th Cir.2002) (citing *Gaylor v. United States,* 74 F.3d 214, 217 (10th Cir.1996) ("this court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and *448 not enfeebled by later statements"); *McCoy v. Mass. Inst. of Tech.,* 950 F.2d 13, 19 (1st Cir.1991) ("federal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings ...")).

Although the Supreme Court made clear that the counties' past actions do not "forever taint any effort on their part to deal with the subject matter," *McCreary IV*, at 874, 125 S.Ct. 2722, Defendants offered no new facts on remand that show that their purpose had changed from the one that the Supreme Court found to violate the Establishment Clause. The four changes cited by Defendants are not "genuine changes in constitutionally significant conditions." *Id.* First, Defendants' distinction between the content of the second and third displays does not govern whether the legislators had an improper purpose in hanging the displays and, in any event, those distinctions existed before the Supreme Court issued its decision. Second, the fact that more time has passed since the Supreme Court decision is meaningless in this case, because Defendants have spent the time since the Supreme Court decision continuously seeking to accomplish their initial purpose of posting the Ten Commandments as a religious document. Unlike a case in which the passage of time might have some significance, there has been no dormant period here; Defendants have continuously sought to defend their actions and accomplish what they initially set out to do. Third, the change in government personnel is irrelevant, because the "objective observer" test does not encompass "judicial psychoanalysis of

a drafter's heart of hearts." *Id.* at 862, 125 S.Ct. 2722. Finally, the two sets of "new" government resolutions are not new: the 2005 resolutions were enacted before the Supreme Court's decision and deemed of minimal significance by the Court, and the 2007 resolutions were passed more than a year after the close of discovery in response to the district court's finding that the posting of the Foundations Displays continued to violate the Establishment Clause. Thus, the district court properly found that no facts changed on remand that would affect the Supreme Court's analysis.

Furthermore, even if this Court were to consider the 2007 resolutions, which were adopted after and in direct response to the district court's finding that Defendants continued to advance a religious purpose and more than a year after the close of discovery, it is clear that these resolutions, like the previous statements of purpose, were adopted only as a litigating position. These resolutions represent Defendants' latest effort in a long line of attempts to conform their conduct to the requirements of the Constitution after adverse court rulings. *See Santa Fe,* 530 U.S. at 315, 120 S.Ct. 2266 (noting that the case at issue was "the latest step in developing litigation" and "refus [ing] to turn a blind eye to the context in which [the policy of prayer at football

games] arose" in finding that "this policy was implemented with the purpose of endorsing [religion]"). Thus, like the 2005 resolutions, the 2007 resolutions provide little evidence that Defendant's actual purpose has changed and are of minimal significance in light of the evolution of the evidence. *See McCreary IV,* 545 U.S. at 872 n. 19, 125 S.Ct. 2722.

The fact that this Court has found since the Supreme Court decided *McCreary* that two counties did not have an impermissible religious purpose in posting displays identical to the Foundations Displays at issue does not affect our finding that the counties in this case have still not presented a valid secular purpose. *See ACLU of Ky. v. Grayson County, Ky.,* 591 F.3d 837 (6th Cir.2010); *ACLU of Ky. v. Mercer County, Ky.,* 432 F.3d 624 (6th Cir.2005). The Supreme Court in *McCreary* noted that "the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage." *McCreary IV,* 545 U.S. at 866 n. 14, 125 S.Ct. 2722. Unlike the extended history of sectarian purpose here, in Mercer "there was only one display, one authorizing measure, and one implementation, all of which demonstrate a secular purpose." 432 F.3d at 631. Likewise, the majority in *Grayson* characterized the history of the display as evidencing a predominantly secular purpose. *See Grayson,* 591 F.3d at 849

("As in Mercer County, the approval of the display in Grayson County was not attended by a history evidencing a predominantly religious purpose. There were no earlier displays nor were there any earlier resolutions indicating an avowedly religious purpose."). While there is significant evidence in the Grayson record that Defendants' predominant purpose, as observed by an objective observer, was to post the Ten Commandments as a religious text, we are bound to interpret *Grayson* in a manner that does not conflict with the Supreme Court's decision in *McCreary*.[5] Thus, given the lack of

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[5] However, we also note that the *Mercer* and *Grayson* opinions essentially ignore the Supreme Court's reliance in *McCreary* on both the content of the display and the evolution of the evidence in determining that Defendants had a religious purpose in posting the Foundations Display. The *Mercer* and *Grayson* panels would have us believe that the Supreme Court approved of the content of the Foundations Displays and relied exclusively on the existence of prior displays and past conduct of McCreary County officials in rejecting Defendants' stated purpose as a sham. In fact, the Supreme Court in *McCreary* noted that the puzzling choices that the counties made concerning the content of the Foundations Displays would probably lead an objective observer to "suspect that the Counties were

the same type of extended sectarian history in *Mercer* and *Grayson,* these cases are distinguishable from the instant case. Further, unlike in *Grayson* and *Mercer,* the Supreme Court in *McCreary* has definitively found that the display at issue violates the Establishment Clause, and we are obligated to follow that precedent if no constitutionally significant facts have changed.

Because the Supreme Court found that Defendants acted with the predominant purpose of advancing religion in displaying each of their three Ten Commandment displays in the county courthouses and Defendants continued to exhibit the same purpose when the district court issued its September 28, 2007 order, Defendants' action in posting these displays violated the Establishment Clause. Thus, Plaintiffs have established that they suffered a constitutional violation and will suffer continuing irreparable injury if the violation continues. The fact that Defendants seek to minimize the residue of religious purpose does not mean that Plaintiffs do not suffer continuing irreparable injury so long as

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simply reaching for any way to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality." *McCreary IV*, 545 U.S. at 873, 125 S.Ct. 2722.

the display remains on the walls of the county courthouses. Thus, there is no adequate remedy at law, and Plaintiffs have demonstrated that they are entitled to a permanent injunction.

Accordingly, the district court erred in declining to enter a permanent injunction against Defendants in its September 28, 2007 order after finding that Defendants had violated the Establishment Clause. However, the district court rectified that error by properly enjoining Defendants from posting the displays in its August 4, 2008 order.

III. Disposition of Procedural Claims

A. Plaintiffs' Motion to Amend or Alter Judgment

1. Standard of Review

Although we generally review a grant or denial of a motion to alter or amend a judgment under Rule 59(e) for abuse of discretion, when the Rule 59(e) motion seeks review of a grant of summary judgment, we apply a de novo standard of review. *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1047 (6th Cir.2001). In granting Plaintiffs' Rule 59(e) motion, the district court essentially reconsidered and granted summary judgment in favor of Plaintiffs. Accordingly, we apply a de novo

standard of review.

"A motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment." Fed.R.Civ.P. Rule 59(e) (emphasis added). A court may grant a motion to alter or amend judgment only if there was "(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice." *Intera Corp. v. Henderson,* 428 F.3d 605, 620 (6th Cir.2005) (citing *GenCorp, Inc. v. Am. Int'l Underwriters,* 178 F.3d 804, 834 (6th Cir.1999)).

2. Analysis

Because the district court erroneously denied Plaintiffs' summary judgment motions after finding that Defendants continued to violate the Establishment Clause and that no triable issues of fact remained, the district court had not yet entered judgment when it granted Plaintiffs' motion to alter or amend judgment. Thus, Plaintiffs' motion was effectively a motion for reconsideration of summary judgment and "[t]he district court was therefore free to reconsider or reverse its decision for any reason." *Cameron v. Ohio,* 344 Fed.Appx. 115, 118 (6th Cir.2009) (citing *Russell v. GTE Gov't Sys. Corp.,* 141 Fed.Appx. 429, 436 (6th Cir.2005)). However, this Court has also found

that it may be "proper for the [d]istrict [c]ourt to entertain a motion to alter or amend a judgment under Rule 59(e) even though it was filed prior to the actual entry of judgment." *Smith v. Hudson,* 600 F.2d 60, 62 (6th Cir.1979). Under the stricter Rule 59(e) standard, Plaintiffs were entitled to have the judgment altered in view of the district court's clear error of law in declining to enter a permanent injunction in its September 28, 2007 order.

Thus, regardless of whether Plaintiffs' motion should have been classified under Rule 59(e) or Rule 54(b), the district court did not err in reconsidering its earlier decision and determining that Plaintiffs were entitled to a permanent injunction.

B. Defendant's Renewed Motion for Summary Judgment

1. Standard of Review

We generally review a district court's denial of a motion for relief from judgment pursuant to Rule 60(b) only for an abuse of discretion. *Massi v. Walgreen Co.,* 337 Fed.Appx. 542, 545 (6th Cir.2009) (citing *Davis v. Jellico Cmty. Hosp., Inc.,* 912 F.2d 129, 133 (6th Cir.1990)). When this Court reviews for abuse of discretion, it will reverse only when it

"is firmly convinced that a mistake has been made." *Bush v. Rauch,* 38 F.3d 842, 848 (6th Cir.1994) (internal citations omitted).

To overcome this deferential standard of review over a motion for relief from judgment, a party must demonstrate that the district court committed "a clear error of judgment, such as applying the incorrect legal standard, misapplying the correct legal standard, or relying upon clearly erroneous findings of fact." *In re Ferro Corp. Derivative Litig.*, 511 F.3d 611, 623 (6th Cir.2008).

2. Analysis

Because the district court entered judgment in the same decision that it construed Defendants' renewed motion for summary judgment as one for relief from judgment under Rule 60(b), it was reasonable for the district court to construe the entry of judgment as coming before the conversion of Defendants' motion.

Furthermore, a district court has broad discretion to manage its docket. *Reed v. Rhodes,* 179 F.3d 453, 471 (6th Cir.1999). A district court's decision whether a late filing results from "excusable neglect" is subject to review for abuse of discretion. *Allen v. Murph,* 194 F.3d 722, 723-24 (6th Cir.1999).

Defendants filed their renewed motion for summary judgment more than one year after the deadline for dispositive motions had passed without seeking leave to file. Defendants sought to introduce new facts–the 2007 resolutions that were passed after and in response to the district court's summary judgment decision–more than one year after the close of discovery. Accordingly, based on the district court's power to manage its own docket, the court had ample discretion to strike Defendants' late renewed motion for summary judgment. By converting Defendants' renewed summary judgment motion to a Rule 60(b) motion for relief from judgment and considering Defendants' new facts and arguments, the district court was giving Defendants the benefit of the doubt.

Finally, we decline to review the district court's subsequent denial of Defendants' motion for relief from final judgment because we lack jurisdiction. Defendants filed their notice of appeal on September 2, 2008 from the district court's order of August 4, 2008, in which it converted Defendants' motion. The district court did not deny Defendants' Rule 60(b) motion until September 30, 2008. Thus, this order denying relief from judgment was not and could not have been appealed pursuant to Defendants' September 2, 2008 notice of appeal. After the district court's September 30,

2008 denial of relief from judgment, Defendants had 30 days under Fed. R.App. P. 4(a)(1)(A) to file a notice of appeal of that order. However, Defendants failed to do so. This failure deprives this Court of jurisdiction over Defendants' attempt to appeal from the September 30, 2008 order.

CONCLUSION

For the reasons set forth above, we AFFIRM the district court's order permanently enjoining Defendants from erecting each of their three Ten Commandment displays in the McCreary County and Pulaski County courthouses.

CONCURRENCE

JULIA SMITH GIBBONS, Circuit Judge, concurring.

I concur with the majority opinion's thoughtful resolution of the constitutional issues surrounding the 2005 Resolutions and its conclusions on the procedural issues in this case but write to emphasize one point. Given that we lack jurisdiction to consider the counties' appeal from the district court's denial of their motion for relief from judgment under Federal Rule of Civil Procedure 60(b), in which they first brought the 2007 Resolutions to the court's attention, I would not reach the issue of whether the 2007 Resolutions evince a religious

or secular purpose for the Foundations Displays. In light of the Supreme Court's cautioning that the counties' past actions need not "forever taint any effort on their part to deal with the subject matter," *McCreary County v. ACLU,* 545 U.S. 844, 873-74, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005), I would leave this issue to the district court in the first instance. *See Jordon v. Gilligan,* 500 F.2d 701, 707 (6th Cir.1974) (noting that appellate court dicta has persuasive precedential effect only).

DISSENT

RYAN, Circuit Judge, dissenting.

This appeal is essentially a rerun of what the parties argued and our panel majority decided in *ACLU v. McCreary County,* 354 F.3d 438 (6th Cir.2003) (*McCreary III*), and the Supreme Court affirmed in *McCreary County v. ACLU,* 545 U.S. 844, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005) (*McCreary IV*). The only real difference is that this appeal presents the question whether the defendants have "purged" the "Foundations of Law and Government Displays" of the religious "taint" of the Ten Commandments. My colleagues think they have not. I think they could not because there was no "taint" to be "purged," and even if there were, the defendants' effort to do so has been disqualified as a mere "litigating position."

The merits and demerits of the vitally important First Amendment Establishment Clause issues that are at the heart of this case were thoroughly discussed in Judge Clay's opinion for the panel and my dissenting opinion in *McCreary III*, and in Justice Souter's opinion for the Supreme Court and Justice Scalia's dissent in *McCreary IV*.

My colleagues have deftly foreclosed consideration of the issue whether the counties' 2007 resolutions expressly disclaiming any intention to endorse religion may have "purged the taint" of religion from the third set of displays with the dismissive observation that the 2007 resolutions were "adopted only as a litigating position." With that nearly Clausewitz-perfect blocking action, I am left with nothing to add to what I wrote in *McCreary III*, except the following:

1. I humbly associate myself with Justice Scalia's powerful and logically compelling explanation in *McCreary IV* that the displays in question do not violate the First Amendment and never did.

2. I cannot be too critical of my panel colleagues who feel stare decisis bound by the Supreme Court majority's persistent hostility to religion and its refusal to acknowledge the historical

evidence that religion, religious symbols, and the support of religious devotion were of the very essence of the values the Constitution's authors and the ratifying legislators thought they were preserving in the language of the First Amendment.

The result, I fear, is that federal courts will continue to close the Public Square to the display of religious symbols as fundamental as the Ten Commandments, at least until the Supreme Court rediscovers the history and meaning of the words of the religion clauses of the First Amendment and jettisons the flawed reasoning of *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

3. Perhaps the panel's decision in this case, taken together with this court's decisions in *ACLU v. Mercer County,* 432 F.3d 624 (6th Cir.2005), and *ACLU v. Grayson County,* 591 F.3d 837 (6th Cir.2010), will move our court to reconsider en banc what my colleagues have held today, from which I strongly dissent. See *McCreary III* and *McCreary IV.*

No. 08-6069
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, ET AL.,

Plaintiffs-Appellees,

v.

MCCREARY COUNTY, KENTUCKY, ET AL.,

Defendants-Appellants,

BEFORE: RYAN, CLAY, and GIBBONS, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and

decision of the case. Accordingly, the petition is denied. Judge Ryan would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

Eastern District of
Kentucky
FILED
08/04/08
At London
Leslie G Whitmer

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION

CIVIL ACTION NO. 99-507

AMERICAN CIVIL LIBERTIES UNION

OF KENTUCKY, et al.,

PLAINTIFFS,

V.

MCCREARY COUNTY, KENTUCKY, et al.,

DEFENDANTS,

* * * * * * * * * * * * * * * *

MEMORANDUM OPINION AND ORDER

This matter is before the court on the plaintiffs' motion (DE 155) to alter or amend

the court's memorandum opinion and order of September 28, 2007; the defendants' renewed motion for summary judgment (DE 159); and the plaintiffs' motion to strike the defendants' renewed motion for summary judgment (DE 164). The court, having reviewed the record and being otherwise sufficiently advised, will grant the plaintiffs' motion to alter or amend judgment, deny the plaintiffs' motion to strike, and direct that the plaintiffs respond to the defendants' motion, which the court will construe as a motion for relief from a final judgment.

I. Factual Background and Procedural History

In 1999, McCreary County and Pulaski County, Kentucky, each posted a copy of the Ten Commandments in their respective courthouses.[1] Various County orders and ceremonies surrounded the mounting of these initial displays. The American Civil Liberties Union of Kentucky, et al. ("ACLU") brought this action and sought a preliminary injunction requiring removal of the displays based on alleged violations of the Establishment Clause of the First Amendment

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[1] The Ten Commandments were also posted in the Harlan County Schools.

to the United States Constitution. Prior to the resolution of the request for an injunction, the Counties altered their displays and passed resolutions authorizing those new displays. The new displays included documents other than the Ten Commandments, but the additional documents were largely religious in nature.[2] The resolutions authorizing the second displays included language emphasizing the importance of religion. Following the posting of the second

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[2] "Speci fically, the Courthouse Displays were modified to consist of: (1) [the 'endowed by the Creator' passage] from the Declaration of Independence; (2) the Preamble to the Constitution of Kentucky; (3) the national motto of 'In God We Trust'; (4) a page from the Congressional Record . . . declaring it the Year of the Bible and including a copy of the Ten Commandments; (5) a proclamation by President Abraham Lincoln designating April 30, 1863 a National Day of Prayer and Humiliation; (6) an excerpt from President Lincoln's 'Reply to Loyal Colored People of Baltimore upon Presentation of a Bible' reading, 'The Bible is the best gift God has ever given to man.'; (7) a proclamation by President Ronald Reagan marking 1983 the Year of the Bible; (8) the Mayflower Compact." *McCreary County*, 354 F.3d at 442.

displays, this court granted the plaintiffs' motion for a preliminary injunction against the second displays and ordered removal of the displays.

The Counties complied with the injunction by removing the second displays, but then posted new displays. Prior to posting these third displays, the Counties hired new lawyers and voluntarily dismissed an appeal from the initial preliminary injunction. The third displays consisted of nine documents of equal size, including a copy of the Ten Commandments, and explanatory phrases to accompany each of the documents.[3] The Collection of documents in the third displays is referred to as "The Foundations of American Law and Government Display" (hereinafter "Foundations Display").[4] At The time the third

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[3] In addition to the Ten Commandments, the third displays included: the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice.

[4] The Purpose of the Foundations Display was stated in the explanatory phrases accompanying its documents. The explanatory statement for the Ten Commandments reads:

displays were erected, the Counties did not repeal the resolutions that authorized the second displays or pass new resolutions authorizing the third displays. This court, acting upon a motion by the ACLU, expanded the preliminary injunction to include the third displays, and then the defendants appealed.

The Sixth Circuit Court of Appeals upheld the preliminary injunction, *McCreary County*, 354 F.3d at 438, whereupon the United States Supreme Court granted the defendant's petition for certiorari. After oral argument, but before the Supreme Court opinion was released, the counties repealed and repudiated

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The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which Declared that "we hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.
McCreary County, 545 U.S. at 856

the resolutions authorizing the second displays.[5] *McCreary County*, 545 U.S. at 881. The Supreme Court, finding an unconstitutional religious motive in the posting of the third (Foundations) displays, saw the Counties' repeals of the 1999 resolutions as "acts of obviously minimal significance in the evolution of the evidence," *McCreary County*, 545 U.S. at 872 n. 19, and affirmed the Sixth Circuit and this court's preliminary injunction. The defendants took no action between the issuance of the Supreme Court opinion and the court's memorandum opinion and order of September 28, 2007, which is under reconsideration here.

On September 28, 2007, this court denied the parties' motions for summary judgment and partial summary judgment and dismissed the plaintiffs' claims against the defendants Harlan County School Districts and Don Musselman in his official capacity as Superintendent of the

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[5] The United States Supreme Court held oral argument on March 2, 2005. On March 8, 2005, and March 10, 2005, McCreary and Pulaski Counties each adopted a resolution that repealed and rescinded the December 1999 resolution relating to the Second displays.

Harlan County Schools with prejudice.[6] The McCreary County and Pulaski County fiscal courts passed new resolutions on October 9, 2007 and October 10, 2007 respectively. The defendants, in their response to the motion to alter or amend judgment and their renewed motion for summary judgment, contend that these October 2007 resolutions "purge the taint" of unconstitutional motive found by the Supreme Court.

II. Motion to Amend or Alter Judgment

A. Legal Standard

Rule 59(e) governs a motion to alter or amend judgment. *Tritent Int'l Corp.* v. *Kentucky*, 395 F. Supp. 2d 521, 523 (E.D. Ky. 2005). The Court will reconsider a ruling under Rule 59(e) if it has committed a legal error; if there has been an intervening change in controlling law; if there is newly discovered evidence; or if necessary to prevent manifest injustice. *GenCorp, Inc.* v. *Am. Int'l Underwriters*, 178F.3d 804, 834 (6th Cir. 1999).

Rule 60(a) provides for corrections based on "a clerical mistake or a mistake

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[6] The court dismissed the claims against the Harlan County Schools and Musselman on the grounds that they had become moot.

arising from oversight or omission whenever one is found in judgment, order, or other part of the record." Rule 60(b) provides for relief from a final judgment, order, or proceeding due to (1) "mistake, inadvertence, surprise, or excusable neglect"; (2) "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by the opposing party"; (4) the judgment being void; and (5) the judgment having been satisfied, released, or discharged" or if "it is based on an earlier judgment that has been reversed or vacated" or if "applying it prospectively is no longer equitable"; or (6) "any other reason that justifies relief." "[R]elief under Rule 60(b) is 'circumscribed by public policy favoring finality of judgments and termination of litigation.'" *Blue Diamond Coal Co.* v. *Trustees of UMWA Combined Ben. Fund*, 249 F.3d 519, 524 (6th Cir. 2001) (quoting *Waifersong Ltd.* v. *Classic Music Vending*, 976 F.2d 290, 292 (6th Cir. 1992)).

B. Dismissal of the Harlan County Action

Though in agreement that the Harlan County action should be dismissed, the parties dispute whether that dismissal should be with prejudice.

"A dismissal for lack of jurisdiction is plainly not a determination of the merits of a claim. Ordinarily such a dismissal is 'without prejudice.'" *Korvettes, Inc.* v. *Galories Anspach, Inc.*, 617 F.2d 1021, 1024 (3d Cir. 1980). *See also Landers* v. *Curran & Connors, Inc.*, 2006 U.S. Dist. Lexis 15770, at *5 (N.D. Cal. 2006). Moreover, "[s]ome cases–mainly involving private plaintiffs as well as private defendants –find that discontinuance has mooted the action; even then it may be noted that a new action can be filed if the conduct should be resumed.'" Wright & Miller, *Federal Practice and Procedure*, § 3533.5 (2d Supp. 2005). *See also id.* (2d Supp. 2007) ("[C]laims of mootness may be rejected more readily in an action to protect broad public interests rather than specific private interests."). In *Washegesic* v. *Bloomingdale Public Schools*, 33 F.3d 679 (6th Cir. 1994), an Establishment Clause challenge to the hanging of a portrait of Jesus Christ in a public school was not dismissed as moot even though the plaintiff had graduated "because the portrait does not affect students only – it potentially affects any member of the public who attends an event at the school." *Id.* at 683; *see also id.* at 682 ("The relevant inquiry in this case is similar to that in any 'public facility' case: whether the individual plaintiff uses the facility and suffers actual injury."). Consequently, the court will alter its previous judgment and dismiss the Harlan county action

without prejudice because Jan Doe's case is not moot, in that it affects any member of the public, not just the plaintiff, and because there is no certainty that the prohibited conduct would not be resumed.

C. The Second Displays

The plaintiffs contend that it was not appropriate for the court to decline to invalidate the second displays on the grounds that they "are no longer involved in the case" and that instead the court should have made its first preliminary injunction, which enjoined the second displays, permanent. Specifically, the plaintiffs contend that the court implicitly and improperly concluded that the displays were moot in dismissing the plaintiffs' challenge, while the defendants contend the judgment should not be altered as to these displays because the issue it moot.

"A plaintiff's voluntary cessation of allegedly unlawful conduct does not suffice to moot a case," *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC) Inc.*, 528 U.S. 167, 174 (200), and "[t]he heavy burden of persua[ding] the court that the challenged conduct cannot reasonable be expected to start up again lies with the party asserting mootness." *Akers* v. *McGinnis*, 352 F.3d 1030, 1035 (6th Cir. 2003).

In a case regarding a display in Garrard County identical to the second displays at issue in this case, the court stated as follows:

> Because there is nothing to stop Garrard County from erecting the 1999 Display again at any point in time, a live controversy still exists. Further, the county continues to maintain a display that includes the Ten Commandments, and it is this to which the plaintiffs object. Because the Ten Commandments continue to be part of the current display, the plaintiffs' objections and offense are presumed to continue.

ACLU v. *Garrard County, Kentucky*, 517 F. Supp. 2d 925, 940 (E.D. Ky. 2007). Earlier in their case, the defendants in *Garrard County* had removed their version of the second displays and replaced it with a version of the Foundations Displays while a motion for a preliminary injunction was under consideration, and the second displays were never temporarily enjoined. *Id.* at 928-29. Moreover, courts regularly decline to declare a challenge to discretionary conduct moot despite significantly changed circumstances. *See, e.g.*, *Akers* v. *McGinnis*, 352 F.3d 1030, 1035 (6th Cir. 2003) (finding challenge to discretion of the MDOC [and] there is no guarantee that MDOC

will not change back to its older, stricter Rule as soon as this action terminates"); *Amnex, Inc.* v. *Cox*, 351 F.3d 697, 704 (6th Cir. 2003) (In dismissing an action against the Michigan Attorney general as moot after he withdrew his notice of intended action, "it was not proper for the district court to rely on the mootness doctrine, inasmuch as the Attorney General's withdrawal did not make it absolutely clear that the allegedly wrongful conduct could not be reasonably expected to recur."); *Cam I, Inc.* v. *Louisville/Jefferson County Metro Gov't*, 460 F.3d 717, 719-20 (6th Cir. 2006) ("[A] controversy does not cease to exist by mere virtue of a change in the applicable law. . . . In other words, where the changes in the law arguably do not remove the harm or threatened harm underlying the dispute, the case remains alive and suitable for judicial determination." (Internal quotation marks and citations omitted.)) In light of this judicial precedent, there is no guarantee that the second displays will not be posted again. Therefore, pursuant to Rule 59(e), the court will alter its judgment that the controversy over the second display is moot, to correct a legal error and prevent manifest injustice.

Regarding the substance of the second displays, the defendants do not question the court's finding that the second displays, the defendants do not question the court's finding that the second displays are unconstitutional

(DE153, 9). Consequently, the court is compelled to alter its judgment under Rule 59(e), declare the second displays unconstitutional, and enter a permanent injunction against the second displays.

D. The First Displays

For the sake of clarity and completeness, the court will also declare unconstitutional and permanently enjoin the first displays, even though they were removed and replaced by the second displays before the court issued its preliminary injunction against the second displays. All that is said above with regard to the second displays pertains with equal force to the first displays.

E. The Third Displays

The plaintiffs contend that the court should make permanent its preliminary injunction enjoining the third displays because the court found that the conduct of the defendants "is unlawful on the undisputed facts" and, therefore, the plaintiffs "are entitled to prevail under Rule 56" (DE 155, 4).

Regarding the Foundations Displays that McCreary County and Pulaski County propose to post, this court found that "[t]he only remaining issue is whether the defendants have taken actions since the Supreme court decision that demonstrate a predominantly

secular purpose for posting the Foundations Displays and that are sufficient to purge the taint of their impermissible religious purpose" (DE 153, 13). After finding the taint had not been purged, the court denied all of the motions for summary judgment because "[n]o triable issues of fact exist for resolution by a jury" (DE 153, 13).

The court will not alter its findings that the displays evidenced an unconstitutional purpose and that this taint had not been purged as of the date of its memorandum opinion and order. The court concluded that it must find the taint had not been purged because "the Supreme Court found the taint inadequately purged" and all of the actions pointed to by the defendants "were taken by the Counties prior to the decision of the Supreme Court and they were not enough to purge the religious taint" (DE 153, 13).

Importantly, the Supreme Court found that "new statement of purpose were presented only as a litigating position, there being no further authorizing action by the Counties' governing boards" and "the sectarian spirit of the common resolution found enhanced expression in the third display, which quotes more the purely religious language of the Commandments." *McCreary County*, 545 U.S. at 871-72. Moreover, the Supreme Court noted that "[f]ollowing argument in this case, in which the

resolutions were discussed, the McCreary and Pulaski County Boards did repeal the resolutions, acts of obviously minimal significance in the evolution of evidence." *Id.* at 872 n.19. Consequently, the court will alter its judgment under Rule 59(e), declare the Foundations Displays at issue in this case unconstitutional because the taint had not been purged as of the date of the court's memorandum opinion and order of September 28, 2007, and permanently enjoin these third displays.

III. The Defendants' Renewed Motion for Summary Judgment and the Plaintiffs' Motion to Strike

As the Supreme Court noted, it is possible that the defendants might purge the taint of unconstitutional purpose and be able to post the third displays. In fact, the defendants contend that they have already done so with their resolutions of October 9-10, 2007. At issue here, however, is the court's memorandum opinion and order of September 28, 2007, which predates the new resolutions. Moreover, the defendants' renewed motion for summary judgment, which was filed on October 30, 2007, is also untimely because the deadline for dispositive motions in this case was November 3, 2006.

Given that the deadline for dispositive motions has passed, but recognizing this court's obligation to review the Counties' new resolutions to determine whether they have purged the taint, the court will construe the defendants' renewed motion for summary judgment as a motion for relief from a final judgment under Rule 60(b) and will deny the plaintiffs' motion to strike. The court will also direct that the plaintiffs respond to the defendants' motion to strike. The court will also direct that the plaintiffs respond to the defendants' motion, with the time for filing their response to run in accordance with the Local Rules from the date of the entry of this order.

Conclusion

Accordingly,

IT IS ORDERED that the plaintiffs' motion to alter or amend judgment (DE 153) is **GRANTED.**

IT IS FURTHER ORDERED that the dismissal of the Harlan County case is **WITHOUT PREJUDICE.**

IT IS FURTHER ORDERED that the first displays are **DECLARED UNCONSTITUTIONAL** and are **ENJOINED.**

IT IS FURTHER ORDERED that the second displays are **DECLARED UNCONSTITUTIONAL** and are **ENJOINED.**

IT IS FURTHER ORDERED that the third displays are **DECLARED UNCONSTITUTIONAL** and are **ENJOINED.**

IT IS FURTHER ORDERED that the plaintiffs' motion to strike (DE 164) is **DENIED.**

IT IS FURTHER ORDERED that the plaintiffs shall respond to the defendants' renewed motion for summary judgment (DE 159), which the court will construe as a motion for relief from a final judgment, with the time for the filing of the response to run in accordance with the Local Rules, beginning from the date of entry of this order. The time for the defendants to file a reply brief if desired, shall also run in accordance with the Local Rules.

There being no just cause for delay, this order is **FINAL** and **APPEALABLE**.

This matter shall be **STRICKEN** from the active docket because the only remaining issue in this matter is the defendants' motion for relief from a final judgment, which is a post-judgment motion.

Signed on August 4, 2008

/s/ Jennifer B. Coffman, Chief Judge

United States District Court

Eastern District of Kentucky

United States District Court,

E.D. Kentucky,

Southern Division,

London.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, et al., Plaintiffs,

v.

McCREARY COUNTY, KENTUCKY, et al., Defendants.

Civil Action No. 99-507-JBC.

Sept. 28, 2007.

MEMORANDUM OPINION AND ORDER

JENNIFER B. COFFMAN, U.S. District Judge.

This matter is before the court on the defendants' motion for summary judgment (DE 116) and the plaintiffs' motions for summary judgment (DE 132) and partial summary judgment (DE 134). The court, having reviewed the record and being otherwise advised, will deny the motions.

I. Factual Background and Procedural History

Because the facts in this case have been dis-cussed numerous times, see *McCreary County v. ACLU*, 545 U.S. 844, 851-58 (2005); *ACLU v. Mercer County*, 432 F.3d 624, 628-31 (6th Cir.2005); *ACLU v. McCreary County*, 354 F.3d 438, 440-44 (6th Cir.2003); *ACLU v. McCreary County*, 145 F.Supp.2d 845, 846-47 (E.D.Ky.2001), the court will only briefly sum-marize the factual and procedural history.

In 1999, McCreary County and Pulaski County, Kentucky, each posted a copy of the Ten Com-mandments in their respective courthouses. Various county orders and ceremonies sur-rounded the mounting of these initial displays. The American Civil Liberties Union of Kentucky, et al. ("ACLU") brought this action and sought a preliminary injunction requiring removal of the displays based on alleged violations of the Establishment Clause of the U.S. Constitution. Prior to the resolution of the request for an injunction, the Counties altered their displays and passed resolutions authorizing those new displays. The new displays included documents other than the Ten Commandments, but the additional documents were largely religious in nature.[1]

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[1] "Specifically, the Courthouse displays were modified to consist of: (1) [the 'endowed by the Creator' passage] from the Declaration of Independence; (2) the Preamble to the Constitution of Kentucky; (3) the national

The resolutions authorizing the second displays included language emphasizing the importance of religion. Following the posting of the second displays, this court granted the plaintiffs' motion for a preliminary injunction and ordered that the displays be removed.

The Counties complied with the injunction by removing the displays, but then posted new displays. Prior to posting these third displays, the Counties hired new lawyers and voluntarily dismissed an appeal from the initial preliminary injunction. The third displays consisted of nine documents of equal size.

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motto of 'In God We Trust'; (4) a page from the Congressional Record ... declaring it the Year of the Bible and including a copy of the Ten Commandments; (5) a proclamation by President Abraham Lincoln designating April 30, 1863 a National Day of Prayer and Humiliation; (6) an excerpt from President Lincoln's 'Reply to Loyal Colored People of Baltimore upon Presentation of a Bible' reading, 'The Bible is the best gift God has ever given to man.'; (7) a proclamation by President Ronald Reagan marking 1983 the Year of the Bible; (8) the Mayflower Compact ." *McCreary County*, 354 F.3d at 442.

Including a copy of the Ten Commandments, and explanatory phrases to accompany each of the documents.[2] The collection of documents in the third displays is referred to as "The Foundations of American Law and Government Display" (hereinafter "Foundations Displays").[3]

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[2] In addition to the Ten Command·ments, the third displays included: the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice.

[3] The purpose of the Foundations Displays was stated in the explanatory phrases accompanying its documents. The explanatory statement for the Ten Commandments reads:

"The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.' The Ten Commandments provide the moral background of the

At the time the third displays were erected, the Counties did not repeal the resolutions that authorized the second displays or pass new resolutions authorizing the third displays. This court, acting upon a motion by the ACLU, expanded the preliminary injunction to include the third displays, and then the defendants appealed.

The Sixth Circuit Court of Appeals upheld the preliminary injunction, *McCreary County*, 354 F.3d at 438, whereupon the United States Supreme Court granted the defendants' petition for certiorari. After oral argument, but before the Supreme Court opinion was released, the Counties repealed and repudiated the resolutions authorizing the second displays.[4] *McCreary County*, 545 U.S. at 881. The Supreme Court saw the Counties' repeals of the 1999 resolutions as "acts of obviously

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Declaration of Independence and the foundation of our legal tradition."

McCreary County, 545 U.S. at 856.

[4] Oral arguments were held on March 2, 2005 before the United States Supreme Court. On March 8, 2005, and March 10, 2005, McCreary and Pulaski Counties, respectively, each adopted a resolution that repealed and rescinded the December 1999 resolution relating to the second displays.

minimal significance in the evolution of the evidence," *McCreary County*, 545 U.S. at 872 n. 19, and affirmed the Sixth Circuit and this court's preliminary injunction. The defendants have taken no action since the Supreme Court issued its opinion.

II. Standard of Review

A. Summary Judgment Standard

Summary judgment is appropriate only when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The moving party's burden can be satisfied by demonstrating that there is an absence of evidence to support the non-moving party's case. *Id.* at 324-25. To survive summary judgment, the non-moving party must come forward with evidence on which the jury could reasonably find in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). The non-moving party must present more than a mere scintilla of evidence to defeat a motion for summary judgment. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir.1989); Fed.R.Civ.P. 56(e). The court must view all of the evidence in the light most favorable to the party opposing summary judgment. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

B. Permanent Injunction Standard

In general, "[t]he standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success." *Amoco Prod. Co. v. Village of Gambell,* 480 U.S. 531, 546 n. 12 (1987) (citing *Univ. of Texas v. Camenisch*, 451 U.S. 390, 392 (1981)). In the context of the present case, a permanent injunction Is appropriate only if a party can establish that it suffered a constitutional violation from which it will suffer continuing and irreparable injury for which no adequate remedy at law exists. *E.g., Women's Med. Prof'l Com. v. Baird,* 438 F.3d 595, 602 (6th Cir.2006); *see also Kallstrom v. City of Columbus*, 136 F.3d 1055, 1067 (6th Cir.1998) (holding that "[w]here the plaintiff establishes a constitutional violation after a trial on the merits, the plaintiff will be entitled to permanent injunctive relief' after showing "1) a continuing irreparable injury if the court fails to issue the injunction, and 2) the lack of an adequate remedy at law").

III. Legal Analysis

The plaintiffs request that the court make permanent the preliminary injunctions issued against McCreary and Pulaski

Counties.[5] The plaintiffs' motion for partial summary judgment seeks to make permanent the court's first preliminary injunction which enjoined the second displays, and their motion for summary judgment seeks to make the court's supple-mental preliminary injunction permanent. The defendants, in turn, argue that the plaintiffs' challenges to the second displays are moot, and that a permanent injunction would be inappropriate.[6] As discussed below, the court will deny all of the motions because none of the parties are entitled to judgment as a matter of law at this time and further because the second displays are no longer involved in the case.

A. The Establishment Clause and the "Purpose" Analysis

---

[5] Initially this case involved the Harlan County Schools as well. Because the claims against the Harlan County Schools have become moot, the court will dismiss those claims.

[6] The defendants also raise the argument that the plaintiffs lack standing. This court, the Sixth Circuit, and the Supreme Court have previously reached the merits of the case, however, so the court will not now consider the issue of standing.

Government action violates the Establishment Clause if the action does not have "a secular legislative purpose." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). The government must maintain religious neutrality and is clearly not doing so when it "acts with the ostensible and predominant purpose of advancing religion ...." *McCreary County*, 545 U.S. at 860. In determining whether there is a violation of the Establishment Clause, courts may look to the acting party's purpose, and that "purpose" analysis "may be dispositive of the constitutional enquiry...." *McCreary County*, 545 U.S. at 850-51.

The secular purpose advanced by the government actors must be more than a "trivial rationalization." *Id.* at 859. "[A]lthough a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." *Id.* at 864 (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)); *see also id.* at 865 n. 11 ("a secular purpose must be serious to be sufficient").

When "scrutinizing purpose," the court looks to official actions and "openly available data" to determine whether the government's objectives are religious. *Id.* at 862-63 ("official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a

drafter's heart of hearts"). The "purpose" analysis should take into account the evolution and development of the displays at issue. *Id.* The court cannot ignore the history of the religious government action, including the progression of the contested displays. *Id.* at 859.

1. The Context of the Government Action

Whether the government's purpose is to advance religion is measured by an "objective observer" standard. The objective observer is presumed to take into account the "text, legislative history, and implementation" of the government action. McCreary County, 545 U.S. at 862 (quoting *Santa Fe*, 530 U.S. at 308). The objective observer has knowledge of not only the most recent events surrounding a government action, but also any previous events, history, and background. As the standard by which purpose is determined, the objective observer is "presumed to be familiar with the history of the government's actions and competent to learn what history has to show." *Id.* at 866. In response to the defendants' argument that purpose should be determined based on the most recent events rather than the entire series of events, the Supreme Court specifically noted that "the world is not made brand new every morning." *Id.* (noting that "reasonable observers have reasonable memories").

Since context matters when a court determines whether government action constitutes a violation of the Constitution, the court's decision may be altered by factors other than the action itself. Thus, government action, such as posting the Foundations Displays, may be found constitutional in one situation and yet unconstitutional if done under different circumstances in a separate instance. The Supreme Court acknowledged that "it will be the rare case in which one of two identical displays violates the purpose prong" but also states, "where one display has a history manifesting sectarian purpose that the other lacks, it is appropriate that they be treated differently...." *Id.* at 866 n. 14. The intent of the government action has a bearing on its constitutionality, and the court may consider the context surrounding the action when determining the underlying purpose. *See id.* ("[I]t will matter to objective observers whether posting the Commandments follows on the heels of displays motivated by sectarianism, or whether it lacks a history demonstrating that purpose.").

When a display identical to the Foundations Displays at issue here was posted in Mercer County, Kentucky, the trial court found no constitutional violation. Upholding that decision, the Sixth Circuit found that Mercer County's stated purpose, which was to recognize American legal traditions, was

supported by the context and was predominantly secular.[7] *Mercer County*, 432 F.3d at 627, 632. In *Mercer County*, only one display had been created and one county action had been taken, both of which occurred after a county resident's request to erect the Foundations Displays. That same resident actually paid for and hung the displays himself. There were no prior unconstitutional displays in the county to taint the context and history as viewed by an objective observer. The Sixth Circuit found that "[a] reasonable observer would not view this display as an attempt by Mercer County to establish religion...." *Id.* at 632.

Mercer County and the instant case involve identical government action which is

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[7] "[T]he purpose for erecting the 'Foundations' display was that 'all of the documents, including the Ten Commandments, have played a role in the formation of our system of law and government.... [The] display is not intended [to], nor does it, endorse or promote religion. It simply acknowledges our history.' " *Mercer County*, 432 F.3d at 627, 632 (quoting Affidavit of Mercer County Judge Executive Charles H. McGinnis).

constitutional in one instance but unconstitutional in the other. As the defendants acknowledge in their motion, "[t]he Supreme Court in this case held that the first two displays evidenced a predominantly religious purpose." DE 117 at 10 (citing *McCreary County*, 545 U.S. at 844). The Supreme Court additionally found that the Counties' purpose did not change with the posting of the third displays. *McCreary County*, 545 U.S. at 873. In McCreary and Pulaski Counties, the objective observer would be aware of the history of the displays and thus would have knowledge of the impermissible purpose. In Mercer County, the objective observer sees no such taint. The content of the displays, without consideration of its context, is thus not dispositive.

2. Purging the Taint of the impermissible Purpose

Although the Supreme Court found that the Counties in this matter had an impermissible purpose that made their actions unconstitutional and that this purpose continued even with the third displays, and even after the second-display resolutions were repudiated, the Court also found "that the Counties' past actions [do not] forever taint any effort on their part to deal with the subject matter." *McCreary County*, 545 U.S. at 873-74. Since it is possible to purge the taint of the

impermissible religious purpose, it necessarily follows that the injury from the constitutional violation is not "continuing" as required by the standard for a permanent injunction. *See Mercer County*, 432 F.3d at 633 ("The [*McCreary County*] majority narrowly tailored its opinion to the facts as they existed at the time of appeal, even to the point of leaving open the possibility on remand of the district court's lifting the preliminary injunction and denying permanent relief." (citing *McCreary County*, 545 U.S. at 873-74)); see also *ACLU v. Rutherford County*, No. 3:02-CV-0396, 2006 WL 2645198, at *10 (M.D.Tenn. Sept. 14, 2006) ("Combined, *McCreary County* and *Mercer County* teach that (1) a public body may post the Ten Commandments in a public building if the display's purpose is secular and the display does not have the primary purpose of advancing or endorsing religion, and, (2) most pertinent to the issues at hand, even if the same public body previously attempted to post the Ten Commandments in an unconstitutional manner, it may be able to post the Ten Commandments in the future in a constitutionally permissible manner."). If the Counties take sufficient actions that purge the taint of their impermissible religious purpose, then the injury claimed by the plaintiffs will no longer exist and the injunction could be

removed.[8] Therefore, the court will deny the plaintiffs' motion for summary judgment, which seeks to permanently enjoin the third displays, because they are not entitled to a permanent injunction as a matter of law.[9]

---

[8] A district court in Tennessee denied a permanent injunction in a similar case, stating, "Plaintiffs' request is too broad because it forbids the posting of the Ten Commandments in public buildings in Rutherford County from now until eternity. Plaintiffs have not demonstrated that they will suffer irreparable harm if the Court does not permanently enjoin the display because Plaintiffs have not proven that the constitutional violation found by this Court will be ongoing in the future." *ACLU v. Rutherford County,* No. 3:02-CV-0396, 2006 WL 2645198, at *11 (M.D.Tenn. Sept. 14, 2006).

[9] The plaintiffs' motion for partial summary judgment is moot because it seeks to permanently enjoin the second set of displays, which no longer constitutes an ongoing controversy between the parties. The court may adjudicate only ongoing controversies, and an issue be-comes moot when the claims presented have been satisfied or are no longer active, or when the parties lack an interest in the outcome of the case. *See Chirco v. Gateway Oaks, LLC,* 384 F.3d 307, 309 (6th Cir.2004)

Turning from the plaintiffs' motion to the defendants' motion, this court must reject the claim that the Counties' actions taken to date have purged the taint of an impermissible religious purpose. The defendants have taken no action since repealing and repudiating the resolutions which accompanied the second displays–renunciations which the Supreme Court rejected as "acts of obviously minimal significance in the evolution of the evidence," *McCreary County*, 545 U.S. at 872 n. 19, and a "litigating position." *Id*. at 848.

If defendants' past actions are insufficient to purge the taint, what will suffice? To constitutionally post the Foundations Displays, the Counties in the present action "must show that they have purged themselves of their original sectarian purpose relating to the posting of the Ten Commandments." *Rutherford County*, 2006 WL 2645198, at *10. The Counties will have purged the taint only after there are " 'genuine changes in constitutionally significant conditions/"

(citing *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). The defendants have disavowed any intent to reinstate the second displays. See DE 136 at 1; DE 117 at 15.

which could include a demonstration of "a predominantly secular purpose." *Id.* (citing *McCreary County*, 545 U.S. at 874, and *Mercer County*, 432 F.3d at 632-33).

When presented with such a genuine change, "district courts are fully capable of adjusting preliminary relief to take account of genuine changes in constitutionally significant conditions." *McCreary County*, 545 U.S. at 874 (citing *Ashcroft v. ACLU*, 542 U.S. 656 (2004)). Moreover, "the district court should be willing to modify its judgment should the counties later demonstrate a predominantly secular purpose." *Mercer County*, 432 F.3d 624, 632 n. 6 (citing *McCreary County*, 545 U.S. at 873-74).

This court will modify its judgment when the "counties later demonstrate a predominantly secular purpose," *id.*, but they have not yet done so. The Supreme Court reviewed the history of the displays-including repeal and repudiation of the resolutions accompanying the second displays–and found that "[n]o reasonable observer could swallow the claim that the Counties had cast off the objective so unmistakable in the earlier displays." *McCreary County*, 545 U.S. at 872. The Counties claim to "have done every-thing they can to distance themselves from the second display, including changing counsel, changing the display, and eventually repealing the December, 1999, Resolution." DE 117 at 3.

Yet, all of those actions were taken by the Counties prior to the decision of the Supreme Court and they were not enough to purge the religious taint. If the Supreme Court found the taint inadequately purged, so must this court.

Therefore, the court will deny the defendants' motion for summary judgment because they are not entitled to judgment as a matter of law.

B. Resolution of This Case

Although it is possible to constitutionally post the Ten Commandments, the defendants' actions were unconstitutional and remain so until they have purged the taint of their impermissible religious purpose.

A trial in this matter would be unavailing. No triable issues of fact exist for resolution by a jury. The only remaining issue is whether the defendants have taken actions since the Supreme Court decision that demonstrate a pre-dominantly secular purpose for posting the Foundations Displays and that are sufficient to purge the taint of their impermissible religious purpose. Thus, as a matter of law, neither the defendants nor the plaintiffs are entitled to summary judgment.

Accordingly,

IT IS ORDERED that the parties' motions for summary judgment or partial summary judgment (DE 116, 132, 134) are **DENIED.**

IT IS FURTHER ORDERED that the plaintiffs' claims against the defendants Harlan County School District and Don Musselman are **DISMISSED WITH PREJUDICE.**

IT IS FURTHER ORDERED that this matter is referred to U.S. Magistrate Judge James B. Todd for the purpose of conducting a settlement conference, which is scheduled for October 22, 2007, at 9:00 a.m. in Lexington.

[McCREARY COUNTY, KENTUCKY SEAL]

BLAINE PHILLIPS COUNTY
JUDGE/EXECUTIVE
OFFICE OF THE JUDGE/EXECUTIVE
Fax: (606) 376-9499 TDD: 1-800-247-2510

McCREARY COUNTY
1 NORTH MAIN STREET
P.O. BOX 579
WHITLEY CITY, KENTUCKY 42653
(606) 376-2413

MCCREARY COUNTY FISCAL COURT
RESOLUTION 071009-2

RESOLUTION REGARDING FOUNDATIONS OF AMERICAN LAW & GOVERNMENT DISPLAYS

WHEREFORE, McCreary County displayed certain historical documents on the wall of the McCreary County court house called the "Foundations of American Law and Government" display;

WHEREFORE, since the Foundations of American Law and Government display was originally displayed, elections have taken place in McCreary County which have resulted in the election of a new County Judge/Executive and three new Fiscal Court members, and only one

of the Fiscal Court members currently serving was a part of the original decision to display the Foundations of American Law and Government display;

WHEREFORE, the Sixth Circuit Court of Appeals recently found that the Foundations of American Law and Government display was constitutional in a display in the Mercer County court house;

WHEREFORE, the Seventh Circuit Court of Appeals recently held that the Foundations of American Law and Government display was constitutional in the court house in Elkhart County, Indiana;

WHEREFORE, the United States District Court for the Eastern District of Kentucky recently held that the Foundations of American Law and Government was constitutional in a display in Rowan County, Kentucky;

WHEREFORE, McCreary County desires to display the Foundations of Law and Government display in its entirety in the McCreary County court house;

WHEREFORE, McCreary County firmly believes in educating its citizens regarding the history of the County, the State of Kentucky and the United States of America;

WHEREFORE, The Foundations of American Law and Government display contains some of the documents and symbols that displayed an important role in the foundation and development of the system of law and government of the United States, the State of Kentucky and McCreary County;

WHEREFORE, McCreary County wishes to clarify and restate its purpose to display the Foundations of Law and Government display;

WHEREFORE, the purpose to display the Foundations of American Law and Government display is to educate the citizens of McCreary County on some of the documents and symbols that played an important role in the foundations, development and history of McCreary County, the State of Kentucky and the United States of America;

WHEREFORE, McCreary County wishes to expressly state that it does not have a religious motivation for its desire to continue to display the Foundations of American Law and Government display;

THEREFORE BE IT RESOLVED that the purpose of McCreary County in desiring to display the Foundations of American Law and government display is educational and

historical, to educate the citizens of McCreary County about some of the historical documents and symbols that played a role in the foundation and development of the system of law and government in McCreary County, the State of Kentucky and the United States of America;

BE IT FURTHER RESOLVED that McCreary County expressly disclaims any purpose to endorse religion in its desire to display the Foundations of American Law and Government display and expressly repeals, repudiates and disavows any public statements or testimony that may be mistakenly construed to the contrary;

BE IT FURTHER RESOLVED that this Resolution and the Resolution passed by the McCreary County Fiscal Court on March 8, 2005, shall be and hereby are the only statements of the purpose of the Foundations of American Law and Government display. Should there be any other statements, official or otherwise, from this body or any other governmental official of McCreary County, that claim to state the purpose of the Foundations of American Law and Government display, they are herby overruled, superceded, repealed and replaced by this Resolution.

DONE at the City of Whitely City, County of McCreary, Commonwealth of Kentucky, on this 9th day of October 2007, in witness whereof we have hereunto set our hands.

/s/ Blaine Phillips
Judge/Executive of McCreary County

/s/ Judy Redden
Magistrate of McCreary County

/s/ Teddy Coffey
Magistrate of McCreary County

/s/ Roger Phillips
Magistrate of McCreary County

_____
Magistrate of McCreary County

RESOLUTION REGARDING DISPLAY OF HISTORICAL DOCUMENTS

WHEREAS, in October, 2000, the Pulaski County Fiscal Court authorized the display of a grouping of historical documents called the Foundations of American Law & Government display;

WHEREAS, federal courts in Kentucky and Indiana have stated and held that the Foundations of American Law & Government display is constitutional;

WHEREAS, Pulaski County has a desire to display the Foundations of American Law & Government display in its entirety, including all the documents in the display;

WHEREAS, on March 10, 2005, the Pulaski County Fiscal Court adopted a Resolution clarifying and restating the purpose if the Foundations of Law & Government display;

WHEREAS, Pulaski County has had intervening elections since the time the Foundations of Law & Government display was first authorized by the Pulaski County Fiscal Court and since the March 10, 2005, Resolution was passed;

WHEREAS, the intervening elections have resulted in the election of a new County Judge Executive and four new magistrates to the Fiscal Court;

WHEREAS, only one magistrate currently on the Pulaski County Fiscal Court participated in the decision to authorize the Foundations of American Law & Government display;

WHEREAS, it has become necessary for Pulaski County to restate its purpose for its desire to display the Foundations of American Law & Government display;

WHEREAS, Pulaski County desires to educate the citizens of Pulaski County about some of the important and historical documents, symbols and other items that have factored into the formation and continuance of the American system of law and government;

WHEREAS, the Pulaski County Fiscal Court believes that the Foundations of Law & Government display accomplishes this historical and educational purpose;

WHEREAS, the only purpose of the County in desiring to display the Foundations of American Law & Government display in its entirety us educational and historical;

WHEREAS, Pulaski County rejects any intention or motivation or purpose to endorse religion by displaying the Foundations of American Law & Government display in its entirety;

THEREFORE BE IT RESOLVED that Pulaski County's purpose for desiring to display the Foundations of American Law & Government display is educational and historical, to educate the public about some of the historical documents, symbols and other items that played a role in the foundation and development of the system of law and government in Pulaski County, the State of Kentucky and the United States of America;

BE IT FURTHER RESOLVED that Pulaski County expressly denies any purpose to endorse religion in its desire to display the Foundations of American Law & Government display in its entirety and expressly repeals, repudiates and disavows any public statements or testimony that may be mistakenly construed to the contrary;

BE IT FURTHER RESOLVED that this Resolution and the Resolution passed by the Pulaski County Fiscal Court on March 10, 2005, shall be and hereby stand as the only statements of the purpose of the Foundations of

American Law & Government display. If there are any other statements, official or otherwise, from this body or any other governmental official of Pulaski County, that claim to state the purpose of the Foundations of American Law & Government display, they are herby overruled, superceded, repealed and replaced by this Resolution.

DONE at the city of Somerset, County of McCreary, Commonwealth of Kentucky, on this 9th day of October 2007, in witness whereof we have hereunto set our hands.

/s/ Barty Bullock
Judge/Executive of Pulaski County

/s/ Kenny Isaacs
Magistrate of Pulaski County

/s/ Mike Wilson
Magistrate of Pulaski County

/s/ Tommy Barnett 3rd
Magistrate of Pulaski County

/s/ Glenn H. Maxey 4th
Magistrate of Pulaski County

/s/ Mike Strunk
Magistrate of Pulaski County

Magistrate of Pulaski County

Magistrate of Pulaski County

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(2)

No. 10-566

Supreme Court, U.S.
FILED
DEC 27 2010
OFFICE OF THE CLERK

In The Supreme Court of the United States

MCCREARY COUNTY, KENTUCKY, et al.,

Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

JUNIS L. BALDON
FROST BROWN TODD LLC
400 West Market Street
32nd Floor
Louisville, Kentucky 40202
ACLU of Kentucky
Cooperating Attorney

WILLIAM E. SHARP
Counsel of Record
ACLU OF KENTUCKY
315 Guthrie Street, Suite 300
Louisville, Kentucky 40202
(502) 581-9746
sharp@aclu-ky.org

EVERETT C. HOFFMAN
PRIDDY CUTLER MILLER & MEADE PLLC
800 Republic Building
429 West Muhammad Ali Blvd.
Louisville, Kentucky 40202
ACLU of Kentucky
Cooperating Attorney

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Sixth Circuit properly affirmed a finding of religious purpose where, following remand from this Court, government officials took no constitutionally significant action to purge the continuing religious taint associated with the Counties' Ten Commandments displays?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents state as follows:

The American Civil Liberties Union of Kentucky has no parent corporations, and no publicly held corporation owns ten percent or more of the American Civil Liberties Union of Kentucky.

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STATEMENT OF THE CASE

1. The First (Stand-Alone) Displays.

In 1999, McCreary County's Judge Executive erected a Ten Commandments display in the county courthouse that consisted solely of one version of the Ten Commandments. The Decalogue was not part of any "educational, historical, or retrospective exhibit."[1] McCreary County's legislative body, the Fiscal Court, authorized the display and directed that it "be posted in a very high traffic area of the courthouse."[2]

Similarly, Pulaski County's Judge Executive also erected a stand-alone copy of the Ten Commandments in the Pulaski County courthouse. It, too, was not part of any larger educational or historical exhibit.[3]

The Respondents filed suit on November 18, 1999, challenging both displays as contrary to the First Amendment's Establishment Clause. [Petitioner Appendix (Pet. App.) 3a.] Soon thereafter, both Counties amended their displays "in an attempt to bring the display[s] within the parameters of the First Amendment and to insulate themselves from suit." [*Id.*]

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[1] *ACLU of Kentucky v. McCreary County*, 96 F.Supp.2d 679, 684 (E.D. Ky. 2000) ("*McCreary I*").

[2] *Id.*

[3] *ACLU of Kentucky v. Pulaski County*, 96 F.Supp.2d 691, 695 (E.D. Ky. 2000) ("*Pulaski I*").

2. The Second Displays.

The Counties' amended displays consisted of a large copy of the Ten Commandments with smaller copies of eight other documents (or portions thereof) to the side of or below the Decalogue. These additional documents included:

> (1) an excerpt from the Declaration of Independence; (2) the Preamble to the Constitution of Kentucky; (3) the national motto of "In God We Trust"; (4) a page from the Congressional Record of Wednesday, February 2, 1983, Vol. 129, No. 8, declaring it the Year of the Bible and including a copy of the Ten Commandments; (5) a proclamation by President Abraham Lincoln designating April 30, 1863 a National Day of Prayer and Humiliation; (6) an excerpt from President Lincoln's "Reply to Loyal Colored People of Baltimore Upon Presentation of a Bible" reading, "The Bible is the best gift God has ever given to man."; (7) a proclamation by President Ronald Reagan marking 1983 the Year of the Bible; and (8) the Mayflower Compact.

[Pet. App. 3a-4a.] While some of these documents were included in the amended displays in their entirety, Petitioners "excerpted a small portion of others to include only that document's reference to God or the Bible with little or no surrounding text."[4]

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[4] *McCreary I*, 96 F.Supp.2d at 684; *Pulaski I*, 96 F.Supp.2d at 696.

These second displays were also accompanied by authorizing resolutions (the 1999 resolutions) "which emphasized the importance of religion in historical documents of the United States and encouraged the County Judge Executive to 'post the Ten Commandments as the precedent legal code upon which the civil and criminal codes of the Commonwealth of Kentucky are founded.'" [Pet. App. 4a (quoting Dist. Ct. R.E. 199 Ex. B).]

Upon Respondents' motion, the district court preliminarily enjoined these modified Ten Commandments displays in May, 2000. Finding that the Counties "narrowly tailored [their] selection of foundational documents to incorporate only those with specific references to Christianity and texts that . . . were chosen only for their religious references," the district court deemed the modified displays to have the purpose and effect of endorsing religion.[5]

Then, after filing and dismissing an appeal from the preliminary injunction, obtaining new counsel, and unsuccessfully seeking clarification of the preliminary injunction's scope, the Counties erected their third Ten Commandments displays.

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[5] *McCreary I*, 96 F.Supp.2d at 687-90; *Pulaski I*, 96 F.Supp.2d at 697-701.

3. The Third (Foundations) Displays.

The Counties' third displays, entitled the Foundations of Law and Government Displays (Foundations Displays), contained nine documents along with an explanation page. [*Id.* at 5a.] This display included the lyrics to the Star Spangled Banner, the Declaration of Independence, the Mayflower Compact, the Bill of Rights, the Magna Carta, the national motto "In God We Trust," the Preamble to the Constitution of Kentucky, the Ten Commandments, a picture of Lady Justice, and a one-page explanatory document.[6] [Pet. App. 5a.] Prior to erecting their Foundations Displays, the Counties neither repealed their 1999 resolutions, nor enacted new resolutions authorizing the Foundations Displays. [*Id.* at 6a.]

Respondents then sought (and obtained) a supplemental preliminary injunction barring the Counties' Foundations Displays.[7] In 2003, the Sixth Circuit Court of Appeals upheld the district court's preliminary injunction, 354 F.3d 438 (6th Cir. 2003)

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[6] The Foundations Displays, as originally erected by the Counties, also included Biblical references consisting of "Exodus 20:3-17" and "King James Version" on the Ten Commandments document. *ACLU of Kentucky v. McCreary County, Kentucky*, 145 F.Supp.2d 845, 847 (E.D. Ky. 2001) ("*McCreary II*"). The Counties removed these references following settlement negotiations. *Id.* For the purposes of this brief, references to the "third display" or the Foundations Display shall refer to the Counties' Foundations Displays without these Biblical references.

[7] *McCreary II*, 145 F.Supp.2d at 851-52.

("*McCreary III*"), and, in 2005, this Court likewise affirmed. 545 U.S. 844 (2005) ("*McCreary IV*").

After oral argument before this Court (but before issuance of the opinion), the Counties rescinded their 1999 resolutions and passed new resolutions (the 2005 resolutions) authorizing their Foundations Displays. [Pet. App. 8a; *id.* at 58a n.4 (noting that both Counties repealed their 2001 resolutions within days of the oral argument).] However, in affirming the preliminary injunction, this Court "viewed the repeal of the 1999 resolutions as 'acts of obviously minimal significance in the evolution of the evidence.'" [Pet. App. 8a (quoting *McCreary IV*, 545 U.S. at 872 n.19).]

4. Events Following Remand.

Upon remand, the parties conducted discovery and, after the close of all discovery, filed cross motions for summary judgment. During this time, Petitioners took "no action" concerning the displays or their authorizing resolutions. [*Id.* at 59a.] In ruling on the summary judgment motions, the district court found that there were no factual disputes and that Respondents were correct on the law. [*Id.* at 71a ("No triable issues of fact exist . . . "); *id.* ("the defendants' actions were unconstitutional and remain so until they have purged the taint of their impermissible religious purpose").] But rather than grant summary judgment, the district court concluded that neither party was entitled to judgment as a matter of law.

Specifically, the district court found that the Counties' inaction since this Court's decision in 2005 rendered judgment for them inappropriate because there were no constitutionally significant actions that evinced "a change in their predominantly religious purpose." [*Id.* at 9a.] The district court also denied judgment to Respondents on the basis that the Counties' constitutional violation could not be "continuing" as required for a permanent injunction "because it is possible to purge the taint of the impermissible religious purpose." [*Id.* (internal quotations and citation omitted).]

Respondents timely filed a motion requesting that the summary judgment denial be amended, arguing that the possibility that the Counties might at some future time establish a lawful purpose for the presently unlawful Foundations Display is not a bar to issuing a permanent injunction; at most it may be grounds for later moving to modify that injunction based on changed circumstances. The district court agreed and, on reconsideration, granted summary judgment to Respondents enjoining each of the Counties' three Ten Commandments displays on the basis that the Counties could point to no constitutionally significant facts since this Court's decision in 2005 that evinced a valid secular purpose for posting the Ten Commandments displays. Thus, the "objective observer" would conclude that they did so primarily to advance religion. [Pet. App. 51a-52a (applying *Lemon v. Kurtzman*, 403 U.S. 602 (1971) in finding Counties' displays violated the purpose inquiry).]

While Respondents' motion to alter or amend the summary judgment decision was pending, the Counties filed a purported "renewed" summary judgment motion. [*Id.* at 37a.] The motion – filed more than one year after the dispositive motion deadline – sought to submit "new" evidence, *i.e.*, new resolutions authorizing the Foundations Displays (the 2007 resolutions) enacted eleven (11) days after the district court's initial summary judgment ruling. [*Id.* at 9a-10a.] Rather than consider Petitioners' motion as one for summary judgment, however, the district court construed it as one under Fed. R. Civ. P. 60 seeking relief from a final judgment in light of its decision to amend its earlier ruling by awarding summary judgment to Respondents. [*Id.* at 10a; 51a.]

The Counties timely filed their notice of appeal from the final judgment granting summary judgment to Respondents but before the district court decided their motion seeking relief under Rule 60 (as construed by the court). Thus, the district court later dismissed that motion without prejudice "on the ground that the court had lost jurisdiction over the [Rule 60] motion when [Petitioners] filed their appeal." [Pet. App. 11a.] Petitioners did not file a second or supplemental notice of appeal from that decision. [*Id.*]

On appeal, the Counties did not challenge the permanent injunction to the extent it barred their first and second displays. [*Id.* at 15a.] Rather, the Counties challenged "only the permanent injunction against the Foundations Display." [*Id.*] In rejecting

the Counties' arguments, the Sixth Circuit affirmed the injunction as to all three of the Decalogue displays with Judge Ryan dissenting. The panel held that since this Court's decision in *McCreary IV*, the Counties had presented "no new facts" to establish that their prior, impermissible purpose had changed. [Pet. App. 20a.] Moreover, the panel found that to the extent the Counties relied upon changes in content between the second and third displays, the passage of time, and changes in governmental personnel, these facts did not constitute "genuine changes in constitutionally significant conditions." [*Id.*] Specifically, the panel noted that two of the claimed changes – differences between the second and third displays, and the enactment of the 2005 resolutions – were considered by this Court in *McCreary IV* when the Court affirmed the preliminary injunction barring the third displays. [*Id.*] The Court of Appeals also held that the passage of time, in this case, was insufficient to purge the Counties' religious purpose because there had been "no dormant period" in the Counties' continued attempts "to defend their actions and accomplish what they initially set out to do." [Pet. App. 20a.] As for the Counties' assertion that change in government personnel also purged the prior religious purpose, the panel rejected that argument noting that the new officials had taken no action to refute the Counties' religious purpose, and that *Lemon*'s purpose inquiry precluded "judicial psychoanalysis of a drafter's heart of hearts." [Pet. App. 20a-21a.]

The Court of Appeals further held that the district court properly construed the Counties' "renewed" motion for summary judgment (in which they first sought to introduce their 2007 resolutions) as one seeking relief from a final judgment under Rule 60 because the Counties tendered the motion and its accompanying "new" evidence more than a year after the close of the district court's discovery and dispositive motion deadlines. [*Id.* at 21a, 25a-30a.] Because the Counties failed to appeal from the district court's dismissal of that motion, the panel also concluded that it lacked jurisdiction to consider whether the district court erred in doing so. [*Id.* at 29a; *id.* at 30a-31a (Smith Gibbons, J., concurring).]

Contrary to the Counties' assertions, the panel did not decide the question of whether the 2007 resolutions were adequate to purge the Counties' religious purpose. Rather, one judge stated that the 2007 resolutions were mere litigation positions and therefore insufficient to purge the Counties' religious purpose, one judge appeared to disagree, and one judge declined to reach the question. [*Id.* at 21a-22a (Clay, J., stating that 2007 resolutions insufficient to purge the Counties' religious purpose); *id.* at 31a-32a (Ryan, J., dissenting) (disagreeing with conclusion that the Counties' past actions were improper and that the 2007 resolutions were mere litigation positions); and *id.* at 30a-31a (Smith Gibbons, J., concurring) (declining to reach question of 2007 resolutions' effect because panel lacked jurisdiction to consider

the Counties' Rule 60 motion in which the resolutions were first raised).]

The Sixth Circuit then rejected the Counties' request for rehearing and rehearing en banc [Pet. App. 34a-35a], with only one judge, Judge Ryan, dissenting from the denial. [*Id.* at 35a.]

PERCEIVED MISSTATEMENTS OF LAW AND FACT

Pursuant to this Court's Rule 15.2, Respondents specifically identify the following perceived misstatements of law and fact in the petition for certiorari.

1. The petition asserts that the Court of Appeals misconstrued this Court's decision in *McCreary IV*, and in doing so held that the Foundations Display violated *Lemon*'s "effect" prong. [Petition for Certiorari ("Pet.") 2, 9, 15.] This is incorrect because the panel specifically noted that "[t]he Supreme Court found the content of the Foundations Displays, in conjunction [with] the evolution of evidence, to reveal Defendants' religious *purpose* in posting the displays." [Pet. App. 15a (emphasis added).] While the panel later described this Court's holding as "definitively" establishing that "the display at issue violates the Establishment Clause" [*id.* at 24a], it is evident that the panel confined its analysis to the purpose inquiry and correctly construed *McCreary IV* as requiring

courts to look to the displays' "context" and "history," not just their contents, when evaluating governmental purpose.

2. The petition also alleges that the Court of Appeals acknowledged that its decision created an intra-circuit conflict with other Sixth Circuit panels finding identical displays constitutional. [Pet. 2, 24.] In fact, the panel explicitly noted that "given the lack of the same type of extended sectarian history" in those cases, they were distinguishable from the facts here. [Pet. App. 23a-24a.]

3. The petition incorrectly asserts that the decision below held that the Counties' 2007 resolutions were mere litigating positions [Pet. 9] and therefore insufficient to purge the Counties' religious purpose. [*Id.* at 7.] As noted above, one judge on the panel opined that they were, one disagreed, and the third declined to reach the issue. [Pet. App. 21a-22a; *id.* at 31a-32a; and *id.* at 30a-31a.] Thus, that portion of the panel's decision lacking a majority does not constitute a holding of the court. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds"); *Texas v. Brown*, 460 U.S. 730, 737 (1983) (stating that reasoning not adopted by a majority of the court is not binding precedent).

4. The petition also misstates the decision below by claiming that the panel "held that this Court definitively determined that the contents and

history of the Foundations Display are impermissible so that the passage of time, change in government leadership and explicit renunciation of prior governmental actions cannot erase the 'taint' from a decade ago." [Pet. 13-14.] On the contrary, the panel expressly noted that *McCreary IV* "made clear that the counties' past actions do not 'forever taint any effort on their part to deal with the subject matter'" of the Ten Commandments. [Pet. App. 20a.]

5. To the extent Petitioners' first Question Presented impliedly includes whether the district court, in deciding summary judgment, erred by refusing to consider whether the 2007 resolutions were sufficient to purge the Counties' religious purpose, the argument is not properly within this Court's certiorari jurisdiction because the issue was raised for the first time in the Counties' "renewed" motion for summary judgment and Petitioners did not appeal from the dismissal of that motion. [Pet. App. 28a-29a.] *See, e.g., Bowles v. Russell*, 551 U.S. 205, 214 (2007) (holding that "timely filing of a notice of appeal in a civil case is a jurisdictional requirement").

6. To the extent Petitioners' first Question Presented impliedly includes whether the decision below properly affirmed the district court's ruling as to the Counties' first and second Decalogue displays, Petitioners' failure to present those arguments to the Court of Appeals counsels against this Court's granting certiorari on those questions. [Pet. App. 14a-15a];

see also California v. Taylor, 353 U.S. 553, 556 n.2 (1957).

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S PRECEDENTS, WITH OTHER SIXTH CIRCUIT OPINIONS, OR WITH DECISIONS FROM OTHER CIRCUITS.

The Court of Appeals' decision does not conflict with this Court's precedents applying *Lemon*'s purpose inquiry. Nor does it conflict with decisions from other circuits or prior Sixth Circuit decisions upholding identical displays because *Lemon*'s purpose analysis is a fact-intensive inquiry that can, as this Court noted, result in "the same governmental action" being found constitutional "if taken in the first instance and unconstitutional if it has a sectarian heritage." *McCreary IV*, 545 U.S. at 866 n.14.

Petitioners' arguments to the contrary are premised upon a fundamental misreading of the Court of Appeals' opinion. Specifically, Petitioners contend that "the Sixth Circuit held that this Court definitively determined that the contents and history of the Foundations Display are impermissible so that the passage of time, change in government leadership and explicit renunciation of prior governmental actions cannot erase the 'taint' from a decade ago." [Pet. 13-14.] Of course, the Court of Appeals did not

so hold. Rather, the panel simply held that the evidence established (as it did when this Court affirmed the preliminary injunction in 2005) that the Counties acted with a predominantly religious purpose in erecting their Decalogue displays, and that Petitioners failed to present any new evidence since this Court's decision in 2005 to justify reaching a different result. [Pet. App. 15a-21a.]

A. The Court of Appeals adhered to this Court's precedents and the law of the case in finding the Counties acted with a predominantly religious purpose in erecting their Decalogue displays.

Petitioners' argument that the decision below conflicts with this Court's precedents, including *McCreary IV*, by improperly construing and applying *Lemon*'s purpose inquiry is without merit. [Pet. 14-19.] The dual premises upon which Petitioners rely – that the panel: 1) adopted a "once tainted, always tainted" approach to evaluating the Counties' purpose [*id.* at 16, 19]; and 2) held that the contents of the Foundations Display constitute a per se violation of *Lemon*'s effect prong [*id.* at 15, 18] – are based upon a fundamental misreading of the decision, not upon any inconsistency with this Court's rulings.

First, there is no support for Petitioners' assertion that the panel adopted a "once tainted, always tainted" approach to assessing the Counties' Decalogue displays. On the contrary, the panel explicitly

noted that "[t]he Supreme Court made clear that the counties' past actions do not 'forever taint any effort on their part to deal with the subject matter. . . .'" [Pet. App. 20a (quoting *McCreary IV*, 545 U.S. at 874).] And the panel properly applied *Lemon*'s purpose analysis by construing the evidence under the "objective observer" standard taking into account the "text, legislative history, and implementation of the statute." [*Id.* at 13a-14a.] Because the Counties could point to no "new" evidence indicating a valid secular purpose for their displays, the panel concluded (as did this Court in 2005) that an objective observer would conclude that the Counties erected those displays primarily to advance religion. [*Id.* at 24a.] Thus, the decision below did not, as Petitioners suggest, hold that "past conduct . . . permanently taints any future displays." [Pet. 19.] Rather, it correctly identified and applied this Court's holdings in conducting the fact-sensitive inquiry for assessing governmental purpose in religious display cases. *See McCreary IV*, 545 U.S. at 867 ("under the Establishment Clause, detail is key").

Petitioners, however, point to the panel's conclusion, *i.e.*, that the Counties erected their Foundations Displays for a predominantly religious purpose, as evidence that the panel adopted a "once tainted, forever tainted" approach. [Pet. 14-15.] But disagreement with the result does not equal misapplication of this Court's precedents, nor does it present a

compelling reason justifying certiorari, even if erroneous.[8] Sup. Ct. R. 10; *see also Boag v. MacDougall*, 454 U.S. 364, 368 (1982) (Rehnquist, J., dissenting) ("[W]e must never forget that this Court is not a forum for the correction of errors."); *Bd. of Education v. McCluskey*, 458 U.S. 966, 972 (1982) (Stevens, J., dissenting) ("We are far too busy to correct every error that we perceive among the thousands of cases that litigants ask us to review").

Petitioners also assert that the decision below conflicts with this Court's precedents because the panel held that the contents of the Foundations Display constitute a *per se* violation of *Lemon*'s "effect" prong. [*Compare* Pet. 15 (indicating that Sixth Circuit "intimate[d]" that displays' contents *per se* violated *Lemon*'s effect prong) *with id.* at 18 (stating that a "finding" of the decision below is that "the *contents* of the Foundations Display are unconstitutional") (emphasis in original).] But nowhere in the decision below does the Court of Appeals rest its ruling on *Lemon*'s effect prong – an argument neither relied upon by the district court in rendering its final judgment nor advanced by Respondents on appeal. [*See* Pet. App. 13a-25a (engaging in *Lemon*'s purpose analysis to affirm district court judgment); *id.* at

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[8] In any event, the Court of Appeals reached the correct result because an objective observer, one who possesses reasonable memories and is familiar with context and history of the displays, would conclude that the Counties erected their displays for a predominantly religious purpose. [Pet. App. 15a-20a.]

49a-50a (district court enjoining third displays on basis of the Counties' unlawful religious purpose).] Petitioners' suggestion that the decision below conflicts with *McCreary IV* is thus incorrect and not a compelling reason to grant certiorari. *See, e.g., Cutter v. Wilkinson,* 544 U.S. 709, 718 n.7 (2005) (noting Supreme Court acts as court of final review, not "first review" in rejecting arguments not addressed below).

Further, the decision below properly adhered to the law of the case doctrine in holding that Petitioners' pre-*McCreary IV* actions (including the repeal of the 1999 resolutions and the adoption of the 2005 resolutions) were insufficient to overcome the evidence indicating the Counties' predominantly religious purpose because this Court had so held. [Pet. App. 18a-19a.] While the lower courts' adherence to the law of the case doctrine does not foreclose this Court's review, such review should only occur where "extraordinary circumstances" exist, such as where the initial decision "was 'clearly erroneous and would work a manifest injustice.'" *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983)). Here, because the panel followed this Court's precedents, particularly the recent holding of *McCreary IV*, no extraordinary circumstances are present warranting this Court's review.

B. The decision below is consistent with other Sixth Circuit opinions upholding identical Foundations Displays because those cases lacked the evidence of religious purpose present here.

The Court of Appeals' decision is also consistent with two prior Sixth Circuit opinions – *ACLU of Kentucky v. Mercer County, Kentucky*, 432 F.3d 624 (6th Cir. 2005) and *ACLU of Kentucky v. Grayson County, Kentucky*, 591 F.3d 837 (6th Cir. 2010) – that upheld identical Foundations Displays. As Petitioners concede, both *Mercer* and *Grayson* acknowledged the "differential history" surrounding those displays from the displays at issue here. [Pet. 26]; *see also Mercer County*, 432 F.3d at 631 (holding that Mercer County's Foundations Display "lack[ed] a similar sectarian pedigree" to those at issue here); *Grayson County*, 591 F.3d at 849 (noting that, like *Mercer*, Grayson County's display was "not attended by a history evidencing a predominantly religious purpose," there being "no earlier displays" nor "any earlier resolutions indicating an avowedly religious purpose"). This differential history is readily apparent upon examination of those cases.

Specifically, *Mercer* lacked *any* evidence of a religious purpose. 432 F.3d at 631. As the *Mercer* panel noted,

> [T]here was only one display, one authorizing measure, and one implementation, all of which demonstrate a secular purpose. The "Foundations" display is the lone exhibit the

> County has posted in its courthouse. There being but one display, the County has needed but one resolution. Mr. Rousey hung the display himself; there is no evidence of a ceremony solemnized by a clergyman. In fact, the only history the objective observer would incorporate into this display is the statement of Judge McGinnis that the purpose of the display is to recognize American legal traditions.

Mercer, 432 F.3d at 631 (holding that Foundations Display, absent any evidence indicating a religious purpose, did not violate *Lemon*'s purpose or effect prongs).

The record in *Grayson* did contain more evidence suggesting a religious purpose than in *Mercer*, but significantly less than is present here. In finding Grayon County's display analogous to that in *Mercer*, the Court of Appeals noted several factors influencing its decision: 1) the absence of "a history evidencing a predominantly religious purpose;" 2) the lack of prior Decalogue displays or authorizing resolutions indicating "an avowedly religious purpose;" and 3) little "official involvement" in the posting of the display. *Grayson*, 591 F.3d at 849.

Here, of course, the displays' sectarian heritage is vastly different, both in terms of quantity and quality, from those in *Mercer* and *Grayson*. Thus, differences in outcome are not, as Petitioners suggest, indicative of an intra-circuit conflict, bu rather emblematic of factual differences relevant to *Lemon*'s purpose

inquiry. *See McCreary IV*, 545 U.S. at 866 n.14 ("where one display has a history of manifesting sectarian purpose that the other lacks, it is appropriate that they be treated differently, for the one display will be properly understood as demonstrating a preference for one group of religious believers as against another").

These factual differences (and the compatibility of the cases' holdings) may also explain why no judge on the Sixth Circuit requested a vote on the request for rehearing en banc, and only Judge Ryan expressed a willingness to grant rehearing. [Pet. App. 34a-35a.] Despite Petitioners' claim that the decision below creates an intra-circuit conflict, the Sixth Circuit disagrees, or at least does not perceive it as being one worthy of en banc rehearing. *See Wisniewski v. United States*, 353 U.S. 901 (1957) (in rejecting certification request from Court of Appeals where different panel in same circuit previously resolved the question, the Court noted that "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties").

C. The decision below is consistent with Establishment Clause decisions in other circuits because divergent outcomes are due to relevant factual differences, not conflicting legal standards.

Petitioners also misconstrue the divergent outcomes in other circuit courts' decisions as indicative of

a conflict of authority with the decision below. [Pet. 29-32.] This argument, as with the claimed intra-circuit conflict, is premised on a faulty reading of the panel's decision and a disregard for the role factual differences play in Establishment Clause analysis. *See, e.g., Books v. County of Elkhart*, 401 F.3d 857 (7th Cir. 2005) (pre-*McCreary IV* decision upholding Foundations Display where no prior Decalogue displays or assertions of purpose belied the county's proffered secular rationale); *ACLU Nebraska Foundation v. City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005) (en banc) (post-*Van Orden* decision upholding Ten Commandments monument in public park where monument identical to that in *Van Orden* and no evidence of a predominantly religious governmental purpose); and *Card v. City of Everett*, 520 F.3d 1009, 1020 (9th Cir. 2008) (applying *Van Orden* in upholding granite Ten Commandments monument where "nothing apart from the monument's text suggest a religious motive on the City's part."). In contrast to the cases from the Seventh, Eighth, and Ninth Circuits, which each contained only one authorizing resolution for a single display or no factual context showing a predominantly religious purpose, the multiple resolutions and displays here evinced a religious purpose such that "[n]o reasonable observer could swallow the claim that the Counties had cast off the objective so unmistakable in the earlier displays." *McCreary IV*, 545 U.S. at 872.

Thus, far from creating a conflict, the Sixth Circuit's decision reflects the application of settled

law to an entirely different set of facts than the cases Petitioners cite. Mere factual distinctions between cases rarely, if ever, present an issue meriting this Court's review. Sup. Ct. R. 10; *see also Layne & Bowler Corp. v. W. Well Works*, 261 U.S. 387, 393 (1923) (dismissing certiorari as improvidently granted where case did not involve either "a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals" or "principles . . . of importance to the public, as distinguished from that of the parties").

II. THIS CASE IS AN INAPPROPRIATE VEHICLE TO REVISIT THE VALIDITY OF THE *LEMON* FRAMEWORK.

Petitioners also argue that certiorari is appropriate to overrule the Establishment Clause framework established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) in favor of an alternative approach. [Pet. 32-48.] But this, too, is not a compelling reason to grant certiorari because this Court previously considered that precise question less than six years ago (in this very case) and reaffirmed *Lemon*'s continued validity. *McCreary IV*, 545 U.S. at 863 (rejecting Counties' arguments seeking abandonment of *Lemon*'s purpose inquiry or alternatively, "trivializing the enquiry into it"). The Court's precedents are "to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error." *Citizens United v. Fed. Election Commission*, 130 S.Ct. 876, 911-12 (2010). And where, as here, the

precedent involves constitutional interpretation, the doctrine of *stare decisis* "carries such persuasive force that we have always required a departure from precedent to be supported by some special justification." *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (internal quotations omitted). The principle of *stare decisis* is further reinforced on these facts by the law of the case doctrine. *See, e.g., Christiansen*, 486 U.S. at 817 (noting that deviation from law of the case doctrine should occur only where "extraordinary circumstances" present).

Moreover, *Lemon*'s purpose analysis remains a valid, workable test by which courts can gleen governmental purpose from readily discoverable facts. Petitioners' assertions to the contrary notwithstanding, the divergent outcomes in religious display cases, even where identical displays are at issue, are reflective of the flexibility of *Lemon*'s purpose inquiry and the fact-sensitive approach it requires, not a symptom of courts' reliance upon conflicting legal principles or inconsistent application. *See, e.g., McCreary IV*, 545 U.S. at 867 ("under the Establishment Clause, detail is key"); *Lee v. Weisman*, 505 U.S. 577, 597 (1992) ("Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one"). And as this Court correctly observed, identical displays with varying degrees of "sectarian heritage" can yield divergent results under the Establishment Clause yet present no incongruity. *McCreary IV*, 545 U.S. at 866 n.14.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JUNIS L. BALDON
FROST BROWN TODD LLC
400 West Market Street
32nd Floor
Louisville, Kentucky 40202
ACLU of Kentucky
Cooperating Attorney

WILLIAM E. SHARP
Counsel of Record
ACLU OF KENTUCKY
315 Guthrie Street, Suite 300
Louisville, Kentucky 40202
(502) 581-9746
sharp@aclu-ky.org

EVERETT C. HOFFMAN
PRIDDY CUTLER MILLER & MEADE PLLC
800 Republic Building
429 West Muhammad Ali Blvd.
Louisville, Kentucky 40202
ACLU of Kentucky
Cooperating Attorney

Counsel for Respondents

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IN THE SUPREME COURT OF THE UNITED STATES

McCREARY COUNTY, KENTUCKY, et. al.,
Petitioners.

v.

ACLU OF KENTUCKY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Mathew D. Staver
(Counsel of Record)
Anita L. Staver
Horatio G. Mihet
Liberty Counsel
1055 Maitland Center
Commons, 2d Floor
Maitland, FL 32751
(800) 671-1776
court@lc.org
Attorneys for Petitioners

Stephen M. Crampton
Mary E. McAlister
David M. Corry
Liberty Counsel
PO Box 11108
Lynchburg, VA 24506
(434) 592-7000
court@lc.org
Attorneys for Petitioners

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REASONS FOR GRANTING THE PETITION

In their effort to dissuade this Court from accepting review, Respondents have aptly demonstrated why it is critical that the Petition be granted. Respondents acknowledge that the identical display has been judged to be both constitutional and unconstitutional, but argue that those divergent opinions are not inconsistent, just reflective of a "fact-intensive" Establishment Clause analysis under *Lemon v. Kurtzman,* 403 U.S. 602 (1971). Respondents ask this Court to apply "law of the case" and *stare decisis*, concepts designed to foster consistent, principled constitutional analysis, to perpetuate the inconsistent, ad hoc determinations spawned by continuing reliance upon *Lemon*. This Court's prior statements about the confusion and conflict *Lemon* has created illustrate why it should decline Respondents' invitation.

"The unintelligibility of this Court's precedent raises the further concern that, either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections." *Van Orden v. Perry,* 545 U.S. 677, 697 (2005) (Thomas, J. concurring in judgment). "The outcome of constitutional cases ought to rest on firmer grounds than the

personal preferences of judges." *Id.* "It is irresponsible to make the Nation's legislators walk th[e] minefield" of Establishment Clause jurisprudence that Respondents are championing. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 756 n.3 (1995).

None of the doctrines or authorities cited by Respondents should persuade this Court to maintain the status quo that has become a trap for unsuspecting legislators and "purgatory" for lower courts. *ACLU of Ky v. Mercer County*, 432 F.3d 624, 636 (6th Cir. 2005). This Court should grant the Petition and provide legislators and lower courts with the objective, principled analytical standard that they need to comply with the Establishment Clause.

I. THE SIXTH CIRCUIT'S DECISION PRESENTS A GENUINE CONFLICT WITH THIS COURT'S PRECEDENT THAT CANNOT BE AVOIDED BY DIVERSIONS OR REFERENCE TO "LAW OF THE CASE."

The Sixth Circuit correctly quoted this Court's statement that the "counties' past actions do not 'forever taint any effort on their part to deal with the subject matter'" of the Foundations of American Law and Government Display ("Foundations Display"). *ACLU of Ky.*

v. McCreary County, 607 F.3d 439, 449 (6th Cir. 2010) (citing *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 873-874 (2005)). It does not follow, however, as Respondents claim, that the Sixth Circuit's decision comports with that directive. (Opposition Brief, pp. 14-15). The Sixth Circuit acknowledged that this Court did not adopt a "once tainted always tainted" approach, but then adopted that approach itself in its dismissive discussion of the post-2005 evidence surrounding Petitioners' Foundations Displays. *Id.* at 448.

The Sixth Circuit did not engage in the thoughtful analysis required to invalidate a passive religious display even under *Lemon*'s ill-defined purpose prong. *Id.* at 448. Instead, the panel merely concluded that the counties had not done enough to "purge the taint." *Id.* The panel provided no direction on how or why the counties' efforts fell short, nor on what would be required to avoid violating the Establishment Clause, indicating that the panel believed that nothing could be done to remove the "taint." *See id.* The panel further signaled that it believed the "taint" could not be purged when it criticized fellow panels of the same Circuit for purportedly ignoring this Court's reliance on the content of the Foundations Displays in McCreary and Pulaski counties. *Id.* at 449 n. 5. "The *Mercer* and *Grayson* panels would have us believe that the

Supreme Court approved of the content of the Foundations Displays and relied exclusively on the existence of prior displays and past conduct of McCreary County officials in rejecting Defendants' stated purpose as a sham." *Id.* (referring to *Mercer County*, 432 F.3d 624 (6th Cir. 2005) and *ACLU of Ky. v. Grayson County*, 591 F.3d 837 (6th Cir. 2010), which found identical Foundations Displays constitutional). The panel clearly indicated that, regardless of whether it accurately quoted this Court's statement that the Displays are not forever tainted, it believes that the Displays are forever tainted and must be found to violate *Lemon*'s purpose prong regardless of other factors. *Id.*

Instead of directly addressing that clear conflict between the panel's decision and this Court's decision in *McCreary County v. ACLU*, 545 U.S. 844 (2005), Respondents try to create a diversion by accusing Petitioners of improperly construing the panel opinion. (Opposition Brief, pp. 14-16). Respondents erroneously claim that Petitioners quote the Sixth Circuit as holding that the contents of the Foundations Displays violate *Lemon*'s "effect" prong. (Opposition Brief, p. 16, citing Petition at 15, 18). However, no more than a cursory glance at the Petition is necessary to confirm that Petitioners correctly stated that the Sixth Circuit did not consider the effects prong. (Petition at 15, 18).

Looking beyond Respondents' diversion to what the Sixth Circuit actually did, it is apparent that the panel failed to adhere to this Court's ruling in *McCreary County*. Rather than engaging in a serious, impartial analysis of the post-2005 evidence proffered by Petitioner, the panel summarily dismissed it as insignificant and pronounced that the Foundations Displays remain "tainted" by a religious purpose. *ACLU v. McCreary County*, 607 F.3d at 448. As discussed above, the panel also made it clear that it believed the "taint" could not be purged.

Resting upon their (incorrect) premise that the Sixth Circuit's ruling is consistent with *McCreary County v. ACLU,* 545 U.S. at 844, Respondents claim that the panel properly applied the "law of the case" doctrine when it concluded that the Foundations Displays remain "tainted." (Opposition Brief, p. 17). However, as Respondents acknowledge, the lower court's adherence to law of the case does not foreclose this Court's review where extraordinary circumstances exist, such as where the initial decision was clearly erroneous and would work a manifest injustice. (Opposition Brief, p. 17, citing *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988). In fact, in *Christianson*, this Court held that a court has the power to revisit its own or coordinate courts' prior decisions in any

circumstance, but should, as a rule, do so only in extraordinary circumstances. *Id.* Respondents conclude that there are no such extraordinary circumstances here because the panel followed this Court's precedents. (Opposition Brief, p. 17). Respondents are incorrect both because extraordinary circumstances are not defined by whether a lower court follows precedent and because the panel did not follow this Court's precedent. In fact, the panel's failure to follow this Court's precedent creates the extraordinary circumstances of an intra-circuit conflict, inter-circuit conflicts, and a hopelessly confused analytical standard which militate in favor of this Court's review.

Furthermore, this Court explicitly said that it was not creating an established rule of law that should be applied in subsequent proceedings. *McCreary County*, 545 U.S. at 873-874. To the contrary, this Court specifically cautioned against such an approach when it said that its decision should not be read to hold that the Foundations Displays were forever "tainted" by religious purpose. *Id.* Noting that the 2005 decision addressed a preliminary injunction, this Court explicitly said that district courts could revisit the question if factual circumstances change. *Id.* Consequently, law of the case did not prevent the Sixth Circuit and does not prevent this

Court from reviewing the issue of whether the counties can hang the Foundations Displays in their courthouses without violating the Establishment Clause.

The conflict caused by the panel's failure to follow this Court's precedents is real and substantial. It cannot be erased by casting aspersions on Petitioners or other Sixth Circuit panels or by misapplying "law of the case." The conflict presented by the Sixth Circuit's ruling should be resolved by this Court.

II. THE SIXTH CIRCUIT'S DECISION CREATES REAL INTRA-CIRCUIT AND INTER-CIRCUIT CONFLICTS THAT SHOULD BE RESOLVED BY THIS COURT.

Respondents' herculean efforts to demonstrate that there is no conflict between the Sixth Circuit's decision and other circuit court decisions actually have the opposite effect, as they demonstrate that there is no principled way to reconcile decisions that reach divergent conclusions about identical passive religious displays. More importantly, they point to the larger problem of the confusing, unpredictable and unworkable standard under which legislators and lower courts must labor when trying to comply with the Establishment Clause.

Respondents assert that the obviously inconsistent decisions of the panel here finding the Foundations Displays unconstitutional and the Sixth Circuit panels in *Mercer County* and *Grayson County* finding identical displays constitutional are, in fact, consistent. (Opposition Brief, p. 18). Respondents try to justify that incredible conclusion by pointing to differences in the "sectarian heritage" of the displays. (Opposition Brief, p. 21). However, as this Court said in *McCreary County v. ACLU*, the fact that a governmental agency might have acted with an impermissible religious purpose in the past does not "forever taint" the display for the future. *McCreary County*, 545 U.S. at 874. Consequently, a purported "tainted history" of one county's display is not a distinction that can justify divergent conclusions regarding the constitutionality of identical displays. As this Court made clear in *McCreary County*, the lower courts cannot use the purported tainted history of a display to justify perpetual differential constitutional analysis. *Id.* Neither can Respondents use the purported tainted history of these Foundations Displays to conclude that the inconsistent rulings in *Mercer County*, *Grayson County* and *McCreary County* are in fact consistent. Respondents cannot escape the fact that the panel's decision in this case created an intra-circuit conflict that should be resolved by this Court.

The fact that the Sixth Circuit refused to grant rehearing en banc does not alter the conclusion that there is an intra-circuit conflict. Respondents speculate that the court's denial of rehearing en banc might be confirmation that there is no conflict, or at least not one worth the court's attention. (Opposition Brief, p. 20). However, Respondents' statement is just that – speculation – not a determination upon which this Court can base its decision. This Court's statement that "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties," *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam), also does not support Respondents' conclusion that there is no intra-circuit conflict. In *Wisniewski*, this Court held that it was improper to use the Court's certification jurisdiction to resolve a panel's doubts about other panels' decisions in the first instance. *Id.* That is not the case here. The Sixth Circuit is not seeking a pre-emptive determination to avoid a conflict, but has already failed to reconcile existing conflicts. That creates the kind of conflict this Court should review and resolve under Supreme Court Rule 10(a).

Similarly, the divergence between this panel's decision and decisions by other circuits is a genuine conflict, not merely the "application of settled law to an entirely different set of facts," as Respondents contend.

(Opposition Brief, p. 22). As this Court has stated on numerous occasions, Establishment Clause analysis under *Lemon* is far from "settled law." *See e.g., Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 45 n. 1 (2004) (Thomas, J. concurring) ("Our jurisprudential confusion has led to results that can only be described as silly."); *Van Orden v Perry*, 545 U.S. 677, 694 (2005) (Thomas, J. concurring in judgment) (Supreme Court's decisions in this area are incoherent). In addition, the other circuit decisions do not present "entirely different sets of facts" than those presented here. *See e.g., Books v. County of Elkhart*, 401 F.3d 857, 866 (7th Cir. 2005) (finding identical Foundations Display constitutional). Therefore, this is not a case of mere factual distinctions in otherwise harmonious rulings, as was the case in *Layne & Bowler Corp. v. W. Well Works*, 261 U.S. 387, 393 (1923).

The Sixth Circuit's opinion creates a real conflict of opinion and authority within the circuit and with other circuit courts on issues of tremendous importance to the public, *e.g.*, the proper test for analyzing Establishment Clause challenges to passive religious displays. As such, it merits this Court's review.

III. STARE DECISIS SHOULD NOT BE USED TO PERPETUATE THE INCONSISTENT, UNPRINCIPLED ANALYSES SPAWNED BY THE CONTINUING USE OF *LEMON*.

Claiming that *Lemon* is a "valid, workable test by which courts can gleen [sic] governmental purpose from readily discoverable facts," Respondents ask this Court to apply *stare decisis* and maintain the status quo. (Opposition Brief, p. 22-23). This Court's repeated criticisms of *Lemon* and the "sisyphean task of trying to patch together" its "'blurred, indistinct, and variable barrier," *Committee for Pub. Educ. & Religious Liberty v. Regan,* 444 U.S. 646, 671 (1980) (Stevens, J., dissenting), show that the test is anything but workable. Instead, as this Court's statements attest, adherence to *Lemon* has put the Court on a course that is sure error, justifying exception from the general rule of respecting the Court's precedents. *Citizens United v. Fed. Election Comm'n,* 130 S.Ct. 876, 911-12 (2010).

Where, as is true with *Lemon*, a decision has "been questioned by Members of the Court in later decisions and [has] defied consistent application by the lower courts," then the Court is justified in reconsidering the decision. *Pearson v. Callahan,* 555 U.S. 223, 129 S.Ct. 808, 818 (2009) (citing *Payne v. Tennessee,* 501

U.S. 808, 829-830 (1991)). Certainly, *stare decisis* is the preferred course "because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne*, 501 U.S. at 827. However, when governing decisions are unworkable or are badly reasoned, as is *Lemon*, "this Court has never felt constrained to follow precedent." *Id.* "*Stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'" *Id.* at 828. (citing *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)). "This is particularly true in constitutional cases, because in such cases "'correction through legislative action is practically impossible.'" *Id.* (citation omitted). The *Payne* court noted that the Court applied those principles to overrule 33 cases in the 20 years leading up to 1991. *Id.*

This Court should follow the same course here. The members of this Court have called *Lemon* incoherent, unintelligible and hopelessly confusing. *See, Van Orden*, 545 U.S. at 694, 697 (Thomas, J. concurring in judgment); *McCreary County*, 545 U.S. at 901 (Scalia, J. dissenting). It is the antithesis of the objective, principled constitutional standard required to distinguish the rule of law from "a dictatorship

of a shifting Supreme Court majority." *McCreary County*, 545 U.S. at 890 (Scalia, J. dissenting). *Lemon* has defied consistent application by the lower courts as evidenced by the intra-circuit and inter-circuit conflicts discussed above. *Lemon* has left this Court's Establishment Clause jurisprudence in "hopeless disarray." *Newdow*, 542 U.S. at 45 n.1 (Thomas, J. concurring). Rather than promoting "evenhanded, predictable, and consistent development of legal principles," *Payne*, 501 U.S. at 827, applying *stare decisis* to *Lemon* would perpetuate unpredictability, inconsistency and confusion. Consequently, *stare decisis* cannot be used, as Respondents request, to keep the "somnolent, docile and useful monster" of the *Lemon* test alive. *See Lamb's Chapel v. Central Moriches Union Free School Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J. concurring in the judgment).

The Sixth Circuit's opinion finding unconstitutional the identical Foundations Displays found constitutional by other Sixth Circuit panels and other circuit courts, and divergent opinions regarding similar passive religious displays, demonstrate the urgent need to revisit the *Lemon* test as a standard for Establishment Clause analysis. This Court should undertake that review and replace *Lemon* with an objective, workable standard that will foster the kind of principled analysis

indispensable to constitutional jurisprudence based upon the rule of law.

CONCLUSION

The panel's decision conflicts with precedents from this Court, decisions from other panels in the Sixth Circuit and decisions in other circuits. The inconsistent decisions finding identical passive religious displays constitutional in one county and unconstitutional in another and similar displays constitutional in one circuit but unconstitutional in another exemplify the pervasive conflict and uncertainty caused by the *Lemon* test. Continuing to rely upon *Lemon* creates unprincipled results which detract from the integrity of the judicial process. Maintaining the status quo would only exacerbate the problem. Therefore, this Court should not rely upon *stare decisis*, but should accept review and reconsider the continuing viability of *Lemon*.

For these reasons, the Petition should be granted.

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Respectfully Submitted,

Mathew D. Staver
(Counsel of Record)
Anita L. Staver
Horatio G. Mihet
LIBERTY COUNSEL
1055 Maitland Center
Commons, 2d Floor
Maitland, FL 32751
(800) 671-1776
court@lc.org

Stephen M. Crampton
Mary E. McAlister
David M. Corry
LIBERTY COUNSEL
PO Box 11108
Lynchburg, VA 24506
(434) 592-7000
court@lc.org

Attorneys for Petitioners